Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-6599; 96-5159

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC.,
Petitioners/Cross-Respondents,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Argued December 5, 1996 Decided July 29, 1997

Before WELLFORD, RYAN, and SILER, Circuit Judges

Donald F. Woodcock (Todd F. Palmer on brief) for Petitioner; David Seid, Attorney, National Labor Relations Board (Peter

Winkler, Attorney, National Labor Relations Board on brief) for Respondent; William W. Osborne, Jr., for Intervenor.

SILER, Circuit Judge:

Figgie International Inc. ("Figgie") and "Automatic" Sprinkler Corporation of America ("Automatic"), a division of Figgie (collectively, "Petitioners"), petition this court to review the Decision and Order by the National Labor Relations Board ("NLRB" or "the Board") finding that Petitioners violated section 8(a)(1), (5), and (3) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1), (5), and (3), by subcontracting bargaining unit work and discriminatorily laying off their employees represented by the unions and by refusing to bargain with the unions that had bargaining status over the decision to subcontract unit work as well as over successor collective bargaining agreements. The NLRB filed a cross-application for enforcement of its Order, and Road Sprinkler Fitters Local Union No. 699 ("Local 699") intervened in this action on the side of the NLRB. For reasons stated herein, we will VACATE the Order of the Board and DENY its enforcement.

I.

Automatic is engaged in the design, fabrication, and installation of automatic fire protection systems. For many years it employed members of Local 669 as well as members of eleven other urban autonomous unions -namely Local 120, Local 281, Local 314, Local 483, Local 536, Local 542, Local 676, Local 692, Local 696, Local 699, and Local 709 --to install these systems.[1] Through its membership in a multi-employer association of sprinkler installation contractors,

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[1]Local 699 and the other unions mentioned belong to the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

the National Fire Sprinkler Association ("NFSA"), Automatic had successive collective bargaining agreements with the unions for many years. The expiration dates of the agreements ranged from July 31, 1993 to June 30, 1995. With the exception of Automatic's agreement with Local 483, all of the collective bargaining agreements contained a provision permitting subcontracting of work to employers who were signatories to the respective local agreements.

In recent years, Automatic had been experiencing financial difficulties. Each year officers and representatives of Figgie and Automatic held meetings to review past company performances and plan for the future. The annual meetings resulted in "hardcore" plans, which are five-year budget projection plans that were modified, updated, and extended yearly. At the annual meeting held in November 1992, the officers and representatives agreed to a plan (the "Neutral Plan"), in which Automatic would become a general contractor and would subcontract out all sprinkler fitter work upon the expiration of its collective bargaining agreements with the unions by August 31, 1995.

The Neutral Plan was expected to result in various benefits, including: gaining control of labor costs; elimination of negotiations with unions and the cost of grievances; minimization of excessive labor costs on some contracts; reduction of administrative labor costs and vehicle costs; elimination of road tool costs; ability to bid both union and non-union projects; and entrance into the residential market.

Automatic withdrew its membership in NFSA by a letter dated February 10, 1993. On the following day, it sent letters to the local unions representing Automatic sprinkler fitters notifying them of the withdrawal. These letters did not mention the Neutral Plan. Automatic thereafter increased its subcontracting, but limited it to contractors that had collective bargaining agreements with the unions as required under its agreements with the unions.

On May 26, 1993, Automatic gave Local 483 and Local 709 notice of termination of the collective bargaining agreements effective August 1, 1993 and September 1, 1993, respectively, pursuant to the terms of the agreements. On January 28, 1994, Automatic notified the remaining unions of its intent not to renew the collective bargaining agreements and of its decision to fundamentally change the nature of its business by becoming a general contractor, whereby it would no longer employ persons represented by the unions in the installation, alteration, maintenance, repair and service of fire control systems. In each of the January 28 letters, Automatic assured the unions that it would negotiate with them in good faith concerning its business decision. The ensuing exchanges between Automatic and the unions varied. The Board found that Automatic refused to negotiate successor bargaining agreements with any of the unions.

Between August 17, 1993 and May 12, 1994, Automatic met with many of the unions to discuss its subcontracting decision. By April 1, 1994, Automatic laid off all of its sprinkler fitter employees, and by June 30, 1994, it liquidated substantially all of its construction vehicles, tools, and equipment formerly used to perform labor work on its sprinkler installation operations. Since that time, Automatic has subcontracted virtually all of its labor work to entities that have signed current collective bargaining agreements with the unions.

Between August 1993 and May 1994, the unions filed unfair labor charges with the NLRB against Petitioners. After conducting a hearing on this matter, an Administrative Law Judge ("ALJ") found against Petitioners. On October 25, 1995, the Board affirmed the rulings, findings, and conclusions of the ALJ.

II.

We accept the Board's factual findings if supported by

substantial evidence on the record as a whole. 29 U.S.C. § 160(f); *YHA, Inc. v. NLRB*, 2 F.3d 168, 172 (6th Cir. 1993). We also review the Board's application of law to particular facts under the substantial evidence standard, but review the Board's conclusions of law de novo. *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 368 (6th Cir. 1993). If the Board erred in determining the proper legal standard, we may refuse enforcement of the Board's order on the ground that it has no "reasonable basis in law." *Id.*; *NLRB v. Brown*, 380 U.S. 278, 291-92, 13 L. Ed. 2d 839, 85 S. Ct. 980 (1965) (requiring reviewing courts to set aside interpretations of the Act by the Board that are inconsistent with statutory mandate, frustrate congressional policy or rest on an erroneous legal foundation). We review de novo the Board's interpretation of contract terms. *Gratiot Community Hosp. v. NLRB*, 51 F.3d 1255, 1261 (6th Cir. 1995).

In reviewing the Board's interpretation of the NLRA, we adhere to the standard of review established by *Holly Farms Corp. v. NLRB*, ___ U.S. ___, 116 S. Ct. 1396 (1996). *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115 (6th Cir. July 11, 1997).

> Under this standard, our first task is to determine "whether Congress has directly spoken to the precise question at issue." [*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).] If Congress has done so, we must give effect to its expression. *Id.* at 842-43. If not, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. *Accord Holly Farms*, 116 S. Ct. at 1406.

Webcor, slip op. at 6 (footnote omitted.)

III.

Under section 8(a)(5) of the Act, an employer commits an

unfair labor practice by refusing to bargain collectively with its employees' representatives in good faith concerning "wages, hours, and other terms or conditions of employment." 29 U.S.C. § 158(a)(5). An employer violates section 8(a)(1) and (5) of the Act if it takes unilateral action regarding a mandatory subject of bargaining without first bargaining to impasse. *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 901 (6th Cir. 1996).

An employer's decision to subcontract work is considered a statutory subject of collective bargaining when it involves "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." *See Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 215, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964). The Board found that Petitioners' subcontracting decision was a mandatory subject of bargaining because they in effect substituted the subcontractors' employees for their own. Petitioners contend, however, that because subcontracting was already a subject covered by the collective bargaining agreement, further bargaining on that subject was foreclosed. We find, contrary to the arguments of the Board and the union intervenor, that Petitioners raised the issue of their contractual right to subcontract in their submission to the Board and that this important issue is before us on appeal. It is not subsumed by claims of anti-union motivation.

> When an employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules that govern their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain with respect to a matter covered by the contract. Thus, we are bound to enforce lawful labor agreements as written.

Gratiot Community Hosp., 51 F.3d at 1261 (citing *NLRB v. United States Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993)). *See also United Mine Workers of Am. v. NLRB*, 879 F.2d 939,

942-44 (D.C. Cir. 1989) (holding that provisions on subcontracting in collective bargaining agreement satisfied company's statutory duty to bargain over the subject of subcontracting).

Here, Petitioners and the unions bargained over the subject of subcontracting and they memorialized that bargain in their respective collective bargaining agreements. This bargain permitted Petitioners to contract out work as long as it was to a contractor who had a collective bargaining agreement with the local union. Because the collective bargaining agreements contained no language providing for subsequent bargaining during the term of the agreements with respect to the subcontracting of work, the Board had no authority to compel Petitioners to bargain with the unions over that subject. *See United Mine Workers*, 879 F.2d at 943 ("'[W]hile the Board has the authority to compel enforcement of terms of a negotiated agreement, it cannot compel enforcement of terms that are not contained in that agreement.'")(quoting *Hyatt Management Corp. v. NLRB*, 817 F.2d 140, 143 (D.C. Cir. 1987)) (citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102, 25 L. Ed. 2d 146, 90 S. Ct. 821 (1970)).

The Board likewise lacked the authority to order Petitioners to reinstate the subcontracted operations that employees represented by the union formerly performed and to reinstate with back pay all employees who were terminated as a result of the permissible subcontracting. The Board is not authorized to "'compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.'" *United Mine Workers*, 879 F.2d at 943 (quoting *H.K. Porter*, 397 U.S. at 106); *see also United States Postal Serv.*, 8 F.3d at 836 (stating that a lawful agreement may not be abrogated by the Board or by the courts merely because one party is unhappy with a term of the contract).

In *Gratiot Community Hospital*, 51 F.3d at 1260, the Sixth Circuit considered the issue of whether a hospital violated

section 8(a)(5) of the Act by failing to bargain with the union over the hospital's elimination of a staffing procedure called the "7/70" program by reducing the nursing staff teams to zero. The relevant provision in the collective bargaining agreement read as follows:

> Assignments to the Seventy Hour Shift will be made by the Director of Nursing in cooperation with the employees involved. The Director of Nursing will decide the number of assignments and the work areas that will be under the Seventy Hour Shift. . . .

Id.

Due to severe financial losses, the hospital unilaterally eliminated the 7/70 program as one of its several cost-cutting measures. *Id.* at 1257-58. As a result, some nurses were laid off or bumped to part-time positions, thereby losing their health benefits. *Id.* at 1258.

This court disagreed with the ALJ's conclusion that although the collective bargaining agreement permitted the hospital to determine the specific number of assignments to the 7/70 program, it neither stated nor implied that the hospital could unilaterally abolish the program altogether. *Id.* at 1261. Instead, we found that the actions by the hospital did not violate the Act because the language in the collective bargaining agreement clearly and unambiguously granted the hospital the authority to determine the number of shifts, including zero, in the 7/70 program. *Id.*

Similarly, the language in the collective bargaining agreements in the present case unambiguously granted Petitioners the authority to subcontract work, without limitation, provided it was to contractors that had agreements with the unions. During the term of the agreements, Petitioners

restricted their subcontracting to union contractors.[2] As mentioned above, we are bound, as is the Board, to enforce the lawful labor agreements between Petitioners and the unions as written. By determining that Petitioners violated section 8(a)(5) by refusing to bargain with the unions concerning their decision to subcontract to union signatories during the term of the agreements, the Board has refused to give meaning and effect to the parties' contractual provisions concerning subcontracting. Such a determination frustrates one of the fundamental policies of the Act: the freedom of contract. *See United Mine Workers*, 879 F.2d at 943.

Furthermore, according to the ALJ, the "agreements were terminated." Neither the ALJ nor the Board determined that the agreements with the eight local unions that had section 9(a) bargaining status -- Locals 669, 692, 536, 281, 314, 699, 483, and 709[3] -- were ineffectively terminated either under the

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[2]The unions maintained that Petitioners subcontracted during the terms of certain collective bargaining agreements with several nonunion subcontractors, but the ALJ found to the contrary where his decision shows that after Automatic withdrew its membership in NFSA, it "increased its subcontracting but apparently restricted it to union employers signatory to the union's collective bargaining agreements with NFSA" and that it "had carefully avoided any overt subcontracting to nonunion employers prior to its January 28, 1994 notice of intention to destroy all its union sprinkler fitter units as circumstances permitted, i.e., contract terminations." ALJ Decision (Dec. 30, 1994), *reprinted in "Automatic" Sprinkler Corp. of Am.*, 319 N.L.R.B. No. 57, 1995 WL 630836, at *4, *9, *25 (Oct. 25, 1995). These findings are not clearly erroneous.

[3]As the Board noted, because Locals 120, 542, 676, and 696 maintained a section 8(f) relationship with Automatic, Automatic was permitted to repudiate that relationship upon expiration of the agreements. *See John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. International Assn. of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988).

contracts' terms[4] or under the Act.[5]

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[4]Each agreement contains a "duration of agreement" provision along with provisions concerning the renewal of the agreement that can be interpreted as giving to either party the right to terminate the agreement provided certain notice requirements are met. Petitioners provided adequate and timely notice to each of the unions of their intent to terminate the collective bargaining agreements. *See New York News Inc. v. Newspaper Guild of New York*, 927 F.2d 82, 84 (2d Cir. 1991) (upholding district court's determination that employer properly terminated collective bargaining agreement pursuant to its terms when it sent union written notice of termination after expiration of the agreement); *see also International Brotherhood of Elec. Workers, Local 26 v. Advin Elec., Inc.*, 98 F.3d 161, 164-65 (4th Cir. 1996) (finding letters sent by employer to union indicating its desire to terminate the collective bargaining agreement upon its expiration effectively terminated agreement).

[5]Section (8)(d) of the Act states:

> The duty to bargain collectively shall also mean that no party to [a collective bargaining] contract shall terminate . . . such contract unless the party desiring such termination . . .
>
> (1) serves a written notice upon the other party to the contract of the proposed termination . . . sixty days prior to the expiration date thereof, . . .;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract . . .;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies [any similar state agencies]; and
>
> (4) continues in full force and effect . . . all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

29 U.S.C. § 158(d)(1)-(4). Petitioners served timely written notice upon each union of the proposed termination, and they also offered to meet and confer with the unions, although apparently not for the purpose of negotiating a new contract. Additionally, Petitioners complied with the fourth requirement. Subcontracting was limited to union signatories during the term of the agreements and the Plan did not call for the contracting out

Although when a collective bargaining agreement expires, an employer has a continuing duty to bargain in good faith and maintain the *status quo* as to conditions of employment in the expired agreement, *see Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir. 1996), it has no such absolute duty at the agreement's termination. *Cf. Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 26-27 (2d Cir. 1988) ("Rights and duties under a collective bargaining agreement do not otherwise survive the contract's termination at an agreed expiration date.") Thus, when the collective bargaining agreements between Petitioners and the unions with section 9(a) bargaining status terminated, rather than merely expired, upon their respective expiration dates, and because the agreements did not provide otherwise, Petitioners were relinquished of any contractual or statutory obligations to the unions. They cannot now be forced to negotiate new agreements with the unions or be prohibited from engaging in nonunion subcontracting. As the Supreme Court has stated, "The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract or hiring individuals on whatever terms' the employer 'may by unilateral action determine.'" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 81 L. Ed. 893, 57 S. Ct. 615 (1937).

The Board relies principally upon *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964), for its position. That case involved an employer's decision which did not change its basic operations. The employer simply decided, *inside its plant*, to subcontract out its maintenance work to save costs. There was *nothing in the collective bargaining agreement* about the employer's right

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of work until after the agreements were terminated. The record does not mention whether notification was given to the Federal Mediation and Conciliation Service.

to subcontract. There was no intimation whether the subcontract was, or was not, a union company. These facts and distinctions clearly make *Fibreboard* distinguishable from those of the instant case. The narrow question was whether mandatory bargaining on this "type of subcontracting out decision" was indicated; the decision did "not encompass other forms of 'contracting out' or 'subcontracting.'" *Id.* at 215.

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment.

Id. at 213.

As put by Justice Stewart in his concurring opinion in *Fibreboard*, the question of whether an employer fulfilled its duty to bargain over its subcontracting decisions "goes to the scope of the employer's duty in the absence of a collective bargaining agreement." *Id.* at 219 (Stewart, J., concurring). In our case, of course, there was a collective bargaining agreement hammered out by the parties, expressly setting out the employer's right to subcontract.

The later Supreme Court authority, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 69 L. Ed. 2d 318, 101 S. Ct. 2573 (1981), is more pertinent to our case. In the latter case, the employer's decision involved "a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all." *Id.* at 677. The Court determined in that case that the employer's decision to cut back and terminate certain union employees, a partial layoff, was not an unfair labor practice under the circumstances.

> We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of § 8(d)'s "terms and conditions," . . . .

Id. at 686 (footnotes omitted). To be sure, neither *Fibreboard* nor *First National* involved the case where, as here, the employer and the local unions had already bargained and provided for the specific right to subcontract or to layoff for economic reasons.

This court has pointed out the pertinent language from the Supreme Court decisions on this issue:

> Despite the importance of give and take between management and labor on many issues, Congress has required mandatory bargaining on matters concerning only "'wages, hours, and other terms and conditions of employment.'" *First Nat'l*, 452 U.S. at 674 . . . (quoting § 158(d)).
>
> Congress did not intend to mandate bargaining over every conceivable issue arising between management and labor. "The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 220, 13 L. Ed. 2d 233, 85 S. Ct. 398 . . . (1964) (Stewart, J., concurring).

NLRB v. Plymouth Stamping Div., Eltec Corp., 870 F.2d 1112, 1115 (6th Cir. 1989).

None of the cases cited by the Board involves a contractual right to subcontract, which is the distinguishable feature in this controversy. We believe the Board was in error in requiring the employer to renegotiate or bargain over a part of the agreed-upon collective bargaining agreement.

Accordingly, we refuse enforcement of the Board's Order on the issue of Petitioners' duty to bargain.

IV.

Under section 8(a)(1) and (3) of the Act, it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

The initial burden of establishing a section 8(a)(3) violation is on the Board. *NLRB v. Kentucky May Coal Co.*, 89 F.3d 1235, 1241 (6th Cir. 1996). Once the Board demonstrates that Petitioners' anti-union animus contributed to the employee's discharge, the burden shifts to the employer to prove by a preponderance of the evidence that there were independent, legitimate reasons for the decision and that the adverse action would have occurred in any event for those reasons. *Turnbull Cone Baking Co. of Tenn. v. NLRB*, 778 F.2d 292, 296 (6th Cir. 1985), *cert. denied*, 476 U.S. 1159, 90 L. Ed. 2d 720, 106 S. Ct. 2277 (1986).

The Board in the present case found the benefits expected to result from the Neutral Plan -- gaining control of labor costs, eliminating labor negotiations, eliminating costs associated with union grievances, and allowing Automatic to become competitive against non-union contractors -- to be direct evidence that Petitioners' actions of subcontracting unit work and discharging unit employees were motivated by anti-union animus. Petitioners also expected the Neutral Plan to result in the reduction of vehicle costs, the elimination of road tool

costs, and entrance into the residential market. Those are legitimate reasons for the decision to adopt the Plan as is the desire to fundamentally change the nature of Automatic's base business from construction to service. In spite of that evidence, however, the ALJ found that Petitioners failed to carry the burden of proving by a preponderance of the evidence that the adverse action would have occurred in the absence of union representation of their employees.

Regardless of whether Petitioners have met their burden, their actions were justified under the subcontracting provisions of the parties' collective bargaining agreement. Therefore, the Board's determination that Petitioners unlawfully discriminated against the unions by subcontracting in accordance with the terms of the collective bargaining agreement is legally erroneous. *See Ironton Publications, Inc. v. NLRB*, 73 F.3d 362 (Table), 1995 WL 758448, at *5, *6 (6th Cir. 1995) (unpublished) (holding legally erroneous a Board's determination that a company discriminated against an employee in violation of section 8(a)(1) and (3) of the Act when, after learning that he had become a union member, the company began to pay the employee according to the terms of the collective bargaining agreement).

Therefore, we also deny enforcement of the Board's order on the issue of Petitioners' discrimination against the unions.

V.

The Order of the Board is VACATED and the Board's petition to enforce its Order is DENIED.

RYAN, Circuit Judge, concurring in part and dissenting in part.

I.

While I agree entirely with the conclusion reached in part

III. of the majority opinion holding that the Board erred "in requiring the employer to renegotiate or bargain" over the employer's decision to subcontract installation, maintenance, and repair work, as permitted by the collective bargaining agreement, I do not agree with some of my brother's reasoning in reaching that conclusion. Specifically, I do not agree with the all-important statement in part III. of my brother's opinion:

> While parties have a continuing duty to bargain in good faith after the *expiration* of a collective bargaining agreement, there is no such duty at the agreement's *termination*. Thus, when the collective bargaining agreements between Petitioners and the unions with 9(a) bargaining status terminated, rather than merely expired, upon their respective expiration dates, and because the agreements did not provide otherwise, Petitioners were relinquished of any contractual or statutory obligations to the unions. (Emphasis added.)

To me, there is no meaningful distinction between the "expiration" of the collective bargaining agreement and its "termination" *in the context of this case*. And, while there was no duty to bargain over "Automatic"'s decision to subcontract to unionized workers the maintenance, repair, and installation work it formerly did in-house, the absence of the duty arises from the terms of the collective bargaining agreement, and not from any supposed distinction between the "expiration" of the agreement and its "termination."

II.

More importantly, I have serious disagreement with the analysis and the conclusion reached in part IV. of the majority opinion. In that part of the opinion, the majority rejects the conclusion of the NLRB that "Automatic" is guilty of a violation of section 8(a)(3) for having committed an unfair labor practice "by discriminating in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). In that conclusion, I think my colleagues are mistaken.

While I have considerable doubt that the NLRB correctly concluded that "Respondent violated section 8(a)(3) of the Act by subcontracting the unit work and *discriminatorily* laying off the unit employees," (emphasis added), I have no doubt whatever that this court has no authority to vacate that decision. It has none because our standard of review is whether there is substantial evidence in the record to support the finding that "Automatic"'s decision to subcontract its installation, maintenance, and repair work--a decision permitted by the collective bargaining agreement if not done discriminatorily--was, in fact, "motivated by antiunion animus" with the "ultimate intent" of ridding the company of a unionized workforce.

The ALJ reached that conclusion in the course of a 41-page, single-spaced written opinion which developed, in very considerable detail, the ALJ's basis for crediting the testimony of the union's witnesses, and discrediting the testimony of the employer's witnesses. And, while I have considerable doubt whether, had I been the statutorily designated fact finder, I would have made the credibility determinations the ALJ did, I have no doubt that, given his assessment of the credibility of the witnesses, there is substantial evidence justifying the conclusion that the employer's subcontracting decision was, in fact, discriminatory, and not, as the ALJ put it, for the "pure as driven snow" reasons claimed by the employer.

There can be no question that "Automatic" did not commit an unfair labor practice under section 8(a)(3) simply by exercising its right guaranteed in the collective bargaining agreement to subcontract installation, repair, and maintenance work to unionized workers, and to eliminate that work in-house. Only if that action is taken with a "discriminatory intent," and for a purpose proscribed by section 8(a)(3), would

the otherwise unassailable business decision become an unfair labor practice, and that, according to the ALJ and the Board, is precisely what happened. The otherwise neutral act of subcontracting, as permitted by the collective bargaining agreement, became an unfair labor practice, because it was, according to the ALJ, a carefully orchestrated, ill-concealed, two-stage program motivated, primarily, by union animus, and designed to rid the company of the financial burden of a unionized workforce. In support of that conclusion, the ALJ found, *inter alia*:

> ["Automatic"'s] conduct was motivated by antiunion animus and violated Section 8(3) of the Act with respect to *all* of the affected employees represented by *all* the Charging Unions, whether represented pursuant to a Sec. 9(a) or 8(f) arrangement.

Additionally,

> Pro-Forma III-A in its first three pages is far more revealing concerning ["Automatic"'s] intentions. . . .
>
> This change will provide us [("Automatic")] the following benefits:
>
> Gain control of labor costs on projects[;]
>
> Minimizes the risk potential for labor cost overruns on contracts [;]
>
> Not signatory to any union contract, its pay demands and its work rules[;]
>
> Eliminate labor negotiations[;]
>
> Eliminate costs associated with union grievances[;]

Further,

> Pro Forma III-A clearly demonstrates ["Automatic"'s] dislike of the restrictions imposed on it by union representation of its employees, and its desire to be a union-free employer. ["Automatic"] had contemplated

the possibility of going nonunion for some time prior to its adoption of the "Neutral" plan, and after some misgivings, took the plunge. . . . ["Automatic"] went to considerable pains to mislead the unions into believing that it was merely extending its subcontracting.

Also,

["Automatic"'s president] advised the local unions representing ["Automatic"] sprinkler fitters of [the company's] withdrawal from NFSA, and sent the following message to [the company's] district managers:

> . . . .
> I need each of you to contact the Business Agent in your area and ask to sit down with them to discuss this change. . . .
> Here is why we withdrew:
> . . . .
> *Union Relationship* - This will force us to work directly with the local unions for the benefit of both. We are not planning to be a non-union contractor. . . .

And,

["Automatic"'s] concealment commenced with its notice to NFSA that it intended to bargain individually with the Unions, continued with its reassurances to Simpson that there would be contractual relationships . . . in the future[.] . . . That announcement itself was designed to mislead the Unions. It invited bargaining on [the company's] decision to no longer employ the Locals' members, but the record clearly shows [the company] had no intention of bargaining on its decision.

And,

> ["Automatic"'s] primary concern was to increase its share of the fire protection market by being free from the unions' collective-bargaining agreements' restrictions on subcontracting which forbade [the company] to subcontract to nonunion firms, and, being thus freed, [the company] would penetrate the market share held by nonunion firms because it could then subcontract to the lowest bidder, union or nonunion.

Finally,

> Respondent's conduct in terminating its union member employees, severing its relationships with the contracting unions, turning toward nonunion subcontracting, and concealing its ultimate plan from the Unions violated Section 8(a)(3) and (1) of the Act.

My brother's opinion does not take issue with these findings by the ALJ and their adoption by the Board. Nor does it assert that the Board erred in performing the burden-shifting analysis required in so-called "dual-motive" cases such as this. *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1291 (6th Cir. 1997).

With regard to the required burden-shifting and "dual-motive" cases, the ALJ wrote:

> Furthermore, General Counsel has shown that the desire to rid itself of the Local Unions, thereby discouraging union activity, was at the very least one of the motivating factors in ["Automatic"'s] decision to become a general contractor and subcontract all its sprinkler installation work. ["Automatic"] therefore is obliged to show by a preponderance of the evidence it would have done so in the absence of union representation of its employees. *Wright Line*, 251 N.L.R.B. 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 76 L. Ed. 2d 667,

> 103 S. Ct. 2469 (1983). *Respondent has not carried this burden.*

(Emphasis added.) The ALJ expressly considered and rejected the proffered legitimate business reasons for "Automatic"'s decision. Nevertheless, my brother writes, "["Automatic"'s] actions were justified under the subcontracting provisions of the parties' collective bargaining agreement. Therefore, the Board's determination that Petitioners unlawfully discriminated against the unions by subcontracting in accordance with the terms of the collective bargaining agreement is legally erroneous." But that observation begs the question, which is, whether "Automatic"'s actions were, indeed, taken "under the subcontracting provisions of the parties' collective bargaining agreement" or were taken for the forbidden discriminatory reason of anti-union animus aimed at simply ridding the employer of the financial burdens of a portion of its unionized workforce. The Board, in adopting the extensive analysis, findings, and conclusions of the ALJ, as well as the credibility determinations by the ALJ, found that the subcontracting decision was not taken "under the subcontracting provisions of the parties' collective bargaining agreement," but, given "Automatic"'s motive, was made in violation of section 8(a)(3).

III.

For these reasons, I respectfully dissent from part IV. of my colleague's opinion and concur in the conclusion reached in part III.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos.: 95-6599: 96-5159

"AUTOMATIC" SPRINKLER CORPORATION
OF AMERICA, ET AL.,
Petitioners/Cross-Respondents,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.,
AFL-CIO,
Intervenor.

Filed October 31, 1997

Before WELLFORD, RYAN, and SILER, Circuit Judges.

ORDER

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the

case. Accordingly, the petitions are denied. Judge Ryan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos.: 95-6599: 96-5159

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA;
FIGGIE INTERNATIONAL, INC.,
Petitioners/Cross-Respondents,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.,
AFL-CIO,
Intervenor.

Issued as Mandate November 14, 1997

Before WELLFORD, RYAN, and SILER, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon a petition for review and cross-application for enforcement of an order against "Automatic" Sprinkler Corporation of America and Figgie International, Inc.

UPON FULL REVIEW of the record and the briefs and arguments of counsel, we conclude that the decision of the Board should not be enforced, and accordingly:

IT IS ORDERED that the order issued by the Board in this

matter be vacated. IT IS FURTHER ORDERED that the petition by National Labor Relations Board to enforce its Order is DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX D

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND ROAD SPRINKLER FITTERS LOCAL UNION NO. 669 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND PIPE FITTERS LOCAL UNION NO. 120 OF CLEVELAND, OHIO, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND ROAD SPRINKLER FITTERS LOCAL UNION NO. 692 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION 536

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT

EMPLOYER AND SPRINKLER FITTERS LOCAL UNION NO. 542, AFFILIATED WITH UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS AND APPRENTICES UNION LOCAL NO. 281, AFFILIATED WITH UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS AND APPRENTICES LOCAL UNION 314

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS AND APPRENTICES LOCAL UNION NO. 699, UA, AFL-CIO

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS LOCAL UNION NO. 696 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS AND APPRENTICES

LOCAL UNION NO. 483 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS LOCAL UNION 676, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC., A SINGLE OR JOINT EMPLOYER AND SPRINKLER FITTERS LOCAL UNION NO. 709 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA.

Cases 8-CA-26201, 8-CA-26471, 8-CA-26333, 8-CA-26454-1 (formerly 4-CA-22747), 8-CA-26454-2 (formerly 5-CA-24283), 8-CA-26454-3 (formerly 6-CA-26399), 8-CA-26454-4 (formerly 13-CA-32462), 8-CA-26454-5 (formerly 17-CA-17319), 8-CA-26454-6 (formerly 19-CA-23298), 8-CA-26454-7 (formerly 19-CA-19870), 8-CA-26454-8 (formerly 2-CA-13389), 8-CA-26454-9 (formerly 34-CA-6556), and 8-CA-26454-10 (formerly 21-CA-30069).

October 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On December 30, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception, and the General Counsel and the Union each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

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[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We also agree with the judge that restoration of the Respondent's sprinkler fitting operations is an appropriate remedy based on the Respondent's unlawful subcontracting of the work that employees represented by the 12 Local Unions formerly performed. Although the judge noted, at fn. 13 of his decision, that the Respondent may introduce evidence at the compliance stage of this case to demonstrate that restoration of these operations is unduly burdensome, we find merit in the General Counsel's and the Union's argument that the judge erred by failing to

The date that the Respondent originally planned to complete the subcontracting of all sprinkler fitter labor work at sec. IV, A, par. 5, of the judge's decision should be August 31, 1995.

We adopt the judge's finding that the Respondent violated Section 8(a)(3) of the Act by subcontracting the unit work and discriminatorily laying off the unit employees. In so concluding, we stress that in the Respondent's internal document containing the subcontracting plan titled "Pro Forma III-A" the Respondent stated that it expected to gain, inter alia, the following benefits from its subcontracting decision:

> Gain *control* of labor costs [emphasis in original] . . . Eliminate labor negotiations; Eliminate costs associated with union grievances . . . Allow "Automatic" to become competitive against nonunion contractors.

Thus, there is direct evidence here showing that the Respondent's decision to subcontract the unit work was discriminatorily motivated as it sought to rid itself of union-represented employees. Regarding Locals 120, 542, 676, and 696 that had 8(f) bargaining status,[3] we specifically note that the Respondent's collective-bargaining agreements with these Locals had varying expiration dates and that, in each case,

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provide that the Respondent can only present previously unavailable evidence in order to make this showing in compliance. See *Compu-Net Communications*, 315 N.L.R.B. 216 fn. 3 (1994). We will modify the judge's order and notice. In so doing, we note that the Respondent chose not to litigate the restoration issue before the judge at the unfair labor practice hearing.

[3]The other eight Locals with which the Respondent had a bargaining relationship, as discussed below, enjoyed 9(a) status.

the agreements had not yet expired before the Respondent discharged the unit employees. Because the Respondent clearly was obligated under *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S. Ct. 222 (1988), to honor the terms of these 8(f) agreements until they expired, we find that the Respondent acted unlawfully in terminating these unit employees for antiunion considerations before expiration.[4]

We also agree with the judge that the Respondent violated Section 8(a)(5) by refusing to bargain with those eight Locals that had 9(a) bargaining status about the decision to subcontract unit work and the effects of that decision, as well as over successor collective-bargaining agreements.[5] It is clear that the Respondent's subcontracting decision was a mandatory subject of bargaining under *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 214 (1964), because the Respondent in effect substituted the subcontractors' employees for its own. The record discloses that the Respondent continues to install and maintain sprinkler systems and that labor costs, which the Local Unions had substantial authority to control, constituted the principal basis for the Respondent's subcontracting decision.[6] Furthermore, as the judge found, the Respondent did

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[4]We find that, in any event, an employer cannot discriminatorily terminate employees, even after an 8(f) contract expires. The expiration of an 8(f) contract simply privileges a withdrawal of recognition, not a discriminatory discharge of employees.

[5]Member Cohen agrees that the subcontracting violated Sec. 8(a)(3), and therefore finds it unnecessary to pass on whether that subcontracting also violated Sec. 8(a)(5) of the Act.

[6] Thus, the present case is clearly distinguishable from *Oklahoma Fixture Co.*, 314 N.L.R.B. 958, 959-960 (1994), in which the

not bargain in good faith over this mandatory subject of bargaining as it presented the Local Unions with a fait accompli and then sought to have them engage in the futile act of bargaining about that decision. Yet, the most compelling proof of the Respondent's bad-faith bargaining in this case is our finding above that the subcontracting decision was discriminatorily motivated. The Board has consistently held that an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining when, as here, antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise. See, e.g., *Equitable Resources Exploration*, 307 N.L.R.B. 730, 732-733 fn. 11 (1992).[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, "Automatic" Sprinkler Corporation of America and Figgie International Inc., a single or joint employer, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in

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Board found that the employer had no duty to bargain about its decision to subcontract electrical work as the employer had legitimate concerns about its legal liability and the risk of losing customers if the work was improperly done. Because labor costs were not a factor in that employer's decision to subcontract such work, the Board concluded that the subcontracting decision there, unlike in this case, involved considerations of corporate strategy fundamental to preservation of the enterprise that were outside the scope of mandatory bargaining.

[7]In the absence of exceptions, we do not pass on whether the Respondent further violated Sec. 8(a)(5) by terminating the unit employees represented by the four 8(f) Locals before any of their collective-bargaining agreements expired.

the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Reinstate the subcontracted operations that employees represented by Locals 669, 120, 692, 536, 542, 281, 314, 699, 696, 483, 676, and 709, formerly performed, unless it is shown at the compliance stage of this proceeding that it is unduly burdensome to reinstate those operations.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 25, 1995, William B. Gould IV, Chairman, Charles I. Cohen, Member and John C. Truesdale, Member.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate employees in order to engage in nonunion subcontracting.

WE WILL NOT unilaterally subcontract bargaining unit work.

WE WILL NOT refuse to bargain with Local Unions 669, 692, 536, 281, 314, 699, 483, and 709 United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO concerning our decision and the effects thereof of subcontracting all work performed by employees represented by those Unions.

WE WILL NOT refuse to bargain with Local Unions 669, 692, 536, 281, 314, 699, 483, and 708 concerning successor collective-bargaining agreements.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate the subcontracted operations that employees represented by Locals 669, 120, 692, 536, 542, 281, 314, 699, 696, 483, 676, and 709 formerly performed, unless it is shown at the compliance stage of this proceeding that it is unduly burdensome to reinstate those operations.

WE WILL offer reinstatement to all employees who were terminated as a result of our unlawful subcontracting and WE WILL make them whole for any loss of earnings they suffered by reason of that unlawful termination, with interest.

WE WILL, on request, bargain with Local Unions 669, 692, 536, 281, 314, 699, 483, and 709 concerning the decision to subcontract and its effects on employees, and for successor collective-bargaining agreements.

WE WILL, on request, furnish Local 669 with information previously requested and relevant and reasonably necessary to its function as a collective-bargaining representative of our

sprinkler fitter employees.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL INC.

* * * *

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated case was litigated before me in Cleveland, Ohio, on 12 days in September and October 1994 pursuant to charges filed and[1] served and a second amended consolidated

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[1]The charges and amended charges in this proceeding were filed and served on the dates set forth below after the designation of the local union of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fining Industry of the United States and Canada, AFL-CIO (United Association) which filed them. The case numbers (Case) in parentheses are the case numbers originally assigned to those charges.

Case	*Local*	*Filing date*	*Service date*	*Type of charge*
8-CA-26201	669	3-4-94	3-7-94	initial
8-CA-26471	669	6-21-94	6-22-94	initial
8-CA-26333	120	4-28-94	4-29-94	initial
8-CA-26454-1 (4-CA-22747)	692	5-13-94	5-13-94	initial
8-CA-26454-2 (5-CA-24283)	536	3-15-94	3-18-94	initial
. . .		5-4-94	5-9-94	amended
8-CA-26454-3	542	5-10-94	5-10-94	initial

complaint issued on August 12, 1994. The General Counsel alleges "Automatic" Sprinkler Corporation of America (ASCOA) and Figgie International Inc. (Figgie) (jointly refereed to as the Respondent) are a single employer or joint employers who have violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act by constructing and implementing a plan to subcontract all work performed by employees represented by the Unions involved herein without giving the Unions prior notice or opportunity to bargain on this decision and its effects, all in order to discourage union membership, and by refusing to furnish Locals 669 and 699 with certain information to which they were entitled. The

Case	*Local*	*Filing date*	*Service date*	*Type of charge*
(6-CA-26399)			6-16-94	
. . .		6-16-94	6-16-94	amended
8-CA-26454-4	281	4-26-94	5-3-94	initial
(13-CA-32462)				
. . .		5-26-94	6-9-94	amended
8-CA-26454-5	314	4-7-94	4-7-94	initial
(17-CA-17319)				
8-CA-26454-6	699	3-29-94	3-29-94	initial
(19-CA-23298)				
8-CA-26454-7	696	5-10-94	5-11-94	initial
(22-CA-19870)				
8-CA-26454-8	483	8-18-93	8-18-93	initial
(32-CA-13389)				
. . .		4-8-94	4-8-94	amended
8-CA-26454-9	676	4-8-94	4-8-94	initial
(34-CA-6556)				
. . .		5-10-94	5-11-94	1st amended
. . .		5-17-94	5-19-94	2d amended
8-CA-26454-10	709	5-18-94	5-19-94	initial
(21-CA-30069)				

Respondent denies it has violated the Act and proffers certain affirmative defenses.

On the entire record, and after carefully considering the demeanor of the witnesses and the very able posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. BUSINESS OF ASCOA AND FIGGIE

ASCOA is a division of Figgie, an Ohio corporation, with an office and place of business in Cleveland, Ohio, and has been engaged, among other things, in the installation, repair, maintenance, and service of fire sprinkler systems (sprinkler fitter work). During the 12 months preceding the issuance of the second amended consolidated complaint, ASCOA, in the course and conduct of its business operations, purchased and received goods and services valued in excess of $ 50,000 directly from suppliers located outside the State of Ohio. At all times material to this proceeding, Figgie has been and is a corporation, and ASCOA and American La France are divisions of the Figgie corporation. Although ASCOA has its own offices, management, and Supervision, ASCOA provides services for and makes sales to Figgie and other divisions of Figgie, and maintains its own personnel, all of which both ASCOA and Figgie concede to be the case, the record clearly shows that, although ASCOA preliminarily formulates and administers its own business practices and labor policy, that formulation and administration is subject to the approval of directors and officers of Figgie, who annually convene with ASCOA officers to jointly formulate policies and practices as they did with the decision to subcontract all of ASCOA's sprinkler installation work that is at issue in this proceeding.

Moreover, the assertion, which is uncontradicted by probative evidence, by ASCOA and Figgie in their answer to the second amended complaint that ASCOA has no separate ownership or directors is, in my view, a concession that Figgie controls the policies and practices of ASCOA. This is consistent with Figgie's June 30, 1994 quarterly report to the Securities and Exchange Commission, which is a consolidated report of Figgie and its subsidiaries. In sum, Figgie and ASCOA are a single-integrated business enterprise controlled by Figgie. The complaint alleges, Respondent in its answer admits, and I find that Figgie and ASCOA have been, at all times material to this proceeding, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

At all times material, Local Unions 669, 120, 692, 536, 542, 281, 314, 699, 696, 483, 676, and 709 (coliectively called the Local Unions or individually referred to by their number) have been labor organizations within the meaning of Section 2(5) of the Act.

All but Locals 120, 542, 676, and 696 enjoy the representative status described in Section 9(a) of the Act as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

Locals 120, 542, 676, and 696 were parties to agreements with Respondent entered into pursuant to Section 8(f) of the Act, which reads in relevant part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act, as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act to the making of such agreement.

III. SUPERVISORS AND AGENTS

At all times material to this proceeding, except as specifically noted, the following named individuals held the positions set forth opposite their names and have been supervisors for Figgie or ASCOA within the meaning of Section 2(11) of the Act and agents for Figgie or ASCOA within the meaning of Section 2(13) of the Act as specifically designated opposite their names:

Harry Figgie, Jr.	Chairman and CEO, Figgie International to 5-18-94
David R. Gross	Manager/Employee Relations, Figgie International Inc.
James Nelson	Manager, Employee Benefits, Figgie International Inc.

Owen G. Stout	President, ASCOA
John J. Gullo, Jr.	Director Human Resources, ASCOA
Richard Douglass	Operations Manager, ASCOA Cleveland Hub
Arthur D. O'Neill	Operations Manager, ASCOA Baltimore Hub since 7-1-93
Phil Skufis	Sales Manager, ASCOA Baltimore Hub
Richard Butts	Manager, ASCOA Kansas City Hub
H. Ray Wilkerson	Operations Manager, ASCOA Cleveland Hub until 1-16-94 District Service Manager, ASCOA Youngstown thereafter
William Wales	Project Manager, ASCOA Baltimore Hub
Wade Sylvester	Sales Manager, ASCOA Cleveland Hub to 1-1-94 District Manager, ASCOA Detroit thereafter
Allen C. Sands	Project Manager, ASCOA
Donald Maupin	District Service Supervisor, ASCOA Louisville
Tony Iannarelli	District Service Supervisor, ASCOA Boston until 6-30-94
Michael May	Regional Superintendent until 7-1-93, Operations Manager, ASCOA Los Angeles Hub thereafter
Roy Comer	Contract Representative, ASCOA Los Angeles Hub from 7-1-93 to 9-3-93
Dwight Bickler	District Service Supervisor,

	ASCOA Kent, Washington, from 7-1-93 to 2-11-94
Rick Waldo	District Service Supervisor, ASCOA Kent, Washington, since 3-16-94
Keith Millard	District Service Representative, ASCOA Kent, Washington, from 11-1-93 to 2-18-94
Larry Goeckner	Superintendent, ASCOA Los Angeles Hub until 9-1-93, thereafter Project Manager, ASCOA Los Angeles Hub
Len Bass	Service Manager, ASCOA Los Angeles Hub

IV. THE ALLEGED UNFAIR LABOR PRACTICES[2]

A. *The Change in Operations*

The Respondent had successive collective-bargaining agreements covering its sprinkler fitter employees who were members of the charging Locals and other local unions of the United Association for many years until the agreements were terminated in the course of the 1992-1994 events presently before me. These agreements were between the charging Locals and local unions and the National Fire Sprinkler Association

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[2]The facts here found are the result of a synthesis of the credited portions of the testimony, the exhibits, stipulations, and consideration of logical consistency and inherent probability. Although I will not in the course of this decision advert to all of the record testimony or documentary evidence, it has been weighed and considered. To the extent that testimony or other evidence not mentioned might appear to weigh against the findings of fact, that evidence has not been disregarded but has been rejected as incredible, lacking in probative worth, surplusage, or irrelevant.

(NFSA), a multiemployer bargaining association who bargained with the unions on behalf of Respondent and its other employer members signatory to the NFSA contract.

Respondent's sprinkler fitter employees were primarily engaged in the installation, alteration, maintenance, repair, and service of fire control systems manufactured and sold by ASCOA. These employees also performed inspection work and made efforts to sell ASCOA's products and related services.

It is Respondent's practice to hold annual meetings chaired by Figgie officers and participated in by officers and other representatives of Figgie and ASCOA for the purpose of reviewing past company performances and planning action for the future. These deliberations result in "Hardcore" plans, which are in fact 5-year budget projection plans modified, updated, and extended yearly. Such a meeting was held in November 1992. The participants, Figgie's and ASCOA's officers and representatives, agreed to a plan (the Neutral Plan) earlier developed by Owen Stout, ASCOA's president, which provided ASCOA would become a general contractor and would subcontract out all sprinkler fitter work after its current collective-bargaining agreements with the locals unions representing its sprinkler fitters expired. Stout testified the transition to general contractor status and the elimination of direct employment of sprinkler fitters should result in various benefits, including the elimination of negotiations with unions and the cost of grievances, the reduction of administrative labor costs, and the minimization of excessive labor costs on some contracts.

According to Michael Siedler, ASCOA's controller, it was calculated that the subcontracting of the sprinkler fitter work would result in a gross savings of about $ 3.7 million per year,

which would be derived from the freedom from paying fringe benefits to the sprinkler fitters, a saving on leased vehicles of 45 percent, a saving of about $ 158,000 on road tools, and a reduction in administrative costs, His calculations did not include the estimation of savings from reduced labor rates. Siedler concedes, however, that no such analysis was presented or discussed at the 1992 Hardcore meeting, and the figures he recites, which include 1993, were but recently developed by him.

Respondent decided at the November 1992 meeting that its plan to be a general contractor would become effective in January 1993 and subcontracting of all sprinkler fitter labor work would be completed by August 31, 1994.

Although Respondent dubbed this new program the "Neutral Plan," it would appear from the testimony of Respondent's witnesses, notably President Stout, that Respondent's primary concern was to increase its share of the fire protection market by being free from the unions' collective-bargaining agreements' restrictions on subcontracting that forbade Respondent to subcontract to nonunion firms, and, being thus freed, Respondent would penetrate the market share held by nonunion firms because it could then subcontract to the lowest bidder, union or nonunion, Respondent's officials had discussed the possibility of becoming a nonunion company in prior years, but had taken no steps to do so. Here they did.

Respondent's documents titled "Pro Forma III-A, B, and C," prepared after the 1992 Hardcore meeting, which describe its plans for 1993 and thereafter, set forth the opening of 22 new service locations to take place on the expiration of its labor contracts, and specifically notes in Pro Forma III-B that 11 of these locations "will open as Neutral (nonunion) operations."

Pro Forma III-A in its first three pages is far more revealing concerning Respondent's intentions. Those pages are set forth below:

PRO FORMA III-A NEUTRAL OPERATIONS

PROJECT DESCRIPTION

A project with the goal of modifying "Automatic" Sprinklers approach to providing for the labor content of its contracting business thereby positioning "Automatic" as a leading fire protection general contractor servicing both union and non-union markets within the fire protection industry at the expiration of the current union contract agreements.

We must carry out this modification in such a manner so as to prevent labor union problems during the transition in order to maintain profitable market share of the union fire protection market.

This change will provide us the following benefits:

Gain control of labor costs on projects

Minimizes the risk potential for labor cost overruns on contracts

Not signatory to any union contract, its pay demands and its work rules

Eliminate labor negotiations Eliminate costs associated with union grievances

Passes workers compensation and salary costs attributable to direct hire of labor force to subcontractor

Reduce vehicle costs

Eliminate road tool costs

Reduce Broadview Heights administration costs associated with union labor

Allow "Automatic" to bid both union and nonunion projects

. . .

Allow "Automatic" to become competitive against non-union contractors

Gives more focus on extras on each project

Entrance into residential market

Execution of this plan must be done with caution so as not to violate any term of existing union contracts and so as not to cause a work slow down by the union labor force on contracts in progress.

"Automatic" will change its method of doing business from one of a fire protection contractor providing its own labor force to that of a fire protection general contractor whereby the labor requirements for contracts sold will be fulfilled through subcontractors who are either union or nonunion as required.

"Automatic" is signatory to 20 labor union contracts with the last one expiring 8/31/95.

Puerto Rico Local 669/821 not addressed as the union is possibly withdrawing from island. Existing contract has been extended to 12/31/92.

The neutral plan will be implemented as follows:

"Automatic" will change its focus on labor procurement beginning 1/4/93 to meet our goal of neutral operations.

Notify individual unions and NFSA as appropriate of our intentions not to renew the contract.

Seek out quotations for sub-contract labor from small union sprinkler companies for all new contract bids beginning 1/4/93.

Identify "company-oriented" fitters who might set up union installation companies if "Automatic" will assist with set up

No new contracts to be performed with in-house

fitters after labor contract expiration dates.
If current backlog completion date exceeds labor contract expiration--subcontract balance to new installation company

This plan will be completed on 8/31/95 as the last contract expires.

At this point, "Automatic" can operate in all parts of the United States as a non-union contractor in areas where we can't compete now because of our union affiliation.

"Automatic" could continue to subcontract to union labor companies on the jobs required.

The total domestic sprinkler market is approximately $ 4.8 billion.

The union segment is $ 2.2 billion and the non-union segment is $ 2.6 billion.

As a neutral contractor (general contractor), "Automatic" can participate competitively in the total fire protection market This is the way to grow the company.

We expect to almost double our contract volume by 1997.

To do this we must restructure our organization to put more sales personnel into the new areas when we become neutral (non-union areas).

We will begin this re-structuring in 1994 to be in place by 1/1/95. Expediting this would interfere with the efforts necessary to put the main ingredient of this plan in motion-developing sources to subcontract the labor.

By letter of February 10, 1993, Stout timely withdrew ASCOA's membership in NFSA. The following day, February

11, 1993, Stout advised the local unions representing ASCOA sprinkler fitters of ASCOA's withdrawal from NFSA, and sent the following message to ASCOA's district managers:

> By now you know that we withdrew from the NFSA.
>
> The attached letter has been sent to the local unions to notify them of our action.
>
> I need each of you to contact the Business Agent in your area and ask to sit down with them to discuss this change. Don't wait for them to call you.
>
> Here is why we withdrew:
>
> Economics--We feel we can better utilize our money and efforts to grow our business.
>
> Growth--We feel the NFSA is not in tune with how bad the industry really is. We will be out of business unless we grow. NFSA membership limits our potential for this.
>
> Control--We want to control as much of our future as we can and not be me-too contractor.
>
> Union Relationship--This will force us to work directly with the local unions for the benefit of both. We are not planning to be a non-union contractor.
>
> Please limit your discussions to these topics. Anything else is risky and could be harmful to "Automatic."

Thereafter, Respondent increased its subcontracting but apparently restricted it to union employers signatory to the unions' collective-bargaining agreements with NFSA as required by that (the NFSA) agreement, to which the charging Locals and other unions are signatory. Respondent took pains to advise union representatives it was not going to sub contract to nonunion employers. For example, Respondent ASCOA's

president Stout, in a March 1993 confidential memo to ASCOA's district managers related that he had told then Local 669 business manager Harold Simpson "We will subcontract/joint venture with only union companies. We do not plan to use non-union. We will work to the letter of our contracts." Simpson agrees that Stout so advised him, and credibly adds that Stout emphasized Respondent would be signatory to a union agreement in future years. Simpson recalls in an article for the May 1993 edition of the Local 669 newsletter that "the company has also informed us that it may go out of the installation business altogether. Whatever "'Automatics' true plan, we must be ever vigilant and aggressively defend our work." This quotation does not establish Local 669 then knew Respondent had decided to sub contract all installation work and no longer employ persons represented by Local 669 for Respondent's sprinkler fitter labor requirements. Respondent's testimony from Stout and Gullo and the content of the Pro Formas shows it was Respondent's plan to subcontract to unionized companies only when necessary.

Respondent notified each Local Union as its contract expired. Thereafter, the exchanges between the Charging Locals and Respondent varied.

Local 669

Respondent sent the following letter to Local 669 on January 28, 1994:

> This is to serve notice that "Automatic" Sprinkler Corporation of America intends to terminate the Agreement presently in effect between it and your Union, effective with the termination dated March 31,

1994. You are further notified that "Automatic" Sprinkler Corporation of America has made a good-faith business decision to permanently and unequivocally alter the basic direction of its business whereby it will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair and service of the "Automatic["] Sprinkler fire control Systems. It is the intention of "Automatic" Sprinkler Corporation of America to implement that fundamental change in its business effective April 1, 1994. In the event that you desire to discuss this business decision and the effects thereof on members of your Union who are or were employed by "Automatic" Sprinkler Corporation of America, please give me a call. You may be assured the Company will negotiate in good faith with you concerning this business decision and its effects on those employees affected by the decision.

Local 669 responded by letter of February 7, 1994 as follows:

Dear Mr. Stout:

In light of your letter of January 28, 1994, this is a request for information on behalf of Local 669 regarding certain business decisions that "Automatic" (or its parent company) has, or may have made which would vitally affect bargaining unit members represented by Local 669:

1. If "Automatic" has made any company-wide or district-wide decision(s) to permanently subcontract or otherwise transfer some or all of its operations as of a certain date, what specific decision was made, when was the decision made, why was it made, and by

whom? If Local 669 was given any official notice of this decision, please forward us a copy of the notice. Did "Automatic" offer to bargain with the Union regarding either the decision or its effects upon unit employees? If so, please describe when such offer was made.

2. If "Automatic" made decision(s) to lay off a portion of the Local 669 bargaining unit, or, for that matter, the entire unit, please advise as to when the decision was made, and why it was made, Prior to January 28, 1994, was Local 669 given notice of and/or an opportunity to bargain with "Automatic" about this decision and/or its effect?

3. Has "Automatic" determined to close all or part of its installation operation at some time in the future? If so, when was the decision made and when does "Automatic" intend to close its installation operations? When was Local 669 notified? Did "Automatic" offer to bargain?

4. Please forward to this office the following documentary information:

--any and all subcontract agreements, or joint venture agreements, or any other contracts or agreements by "Automatic" (and/or its parent) covering, in whole or in part, the transfer of, subcontracting joint venturing or sharing of bargaining unit work as described in Article 18 of our agreement;

--corporate resolutions or other "Automatic" business records indicating when the decisions discussed in paragraphs 1-3 above were made, and the reason(s) why they were made; and

--any Company records indicating the potential effect upon unit employees of these decisions or

any projected studies of cost savings to the Company as a consequence of some or all of these decisions.

We need this information within fourteen (14) days. The Union's legitimate need for this information should be obvious. Without it, we can not protect unit employees from the effects of adverse business decisions by "Automatic." The information will also be useful to Local 669 for negotiation of a new agreement, effective April 1, 1994.

To the extent that "Automatic" has made some or all of the decisions discussed above, this letter will also constitute a demand that "Automatic" cease and desist from this conduct immediately and make whole affected unit employees, as well as a demand by the Union to bargain about the decision(s) and their effects upon represented employees.

Respondent replied to Local 669 on February 15, 1994, by letter as follows, in pertinent part:

As stated in our letter to you dated January 28, 1994, "Automatic" Sprinkler has made a good faith business decision to permanently and unequivocally alter the basic direction of our business whereby we will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair or service of automatic fire control systems.

In our letter dated January 28, 1994, we offered to negotiate in good faith with you concerning this business decision and its effects on those employees affected by the decision.

Your February 7th correspondence requested the answers to certain specific questions with regard to the

Company's decision and seeks certain documents. I have prepared a draft response and am attempting to gather documents responsive to your request. Our legal counsel was tied up in negotiations last week out of town when I received your request and is out of the country until next week. I will ask him to review your request upon his return to the office to assist the Company in complying with its bargaining obligations. Therefor, I wanted to inform you that the company will respond to your request as expeditiously as possible upon the return of our counsel.

This reply was followed by another letter from Respondent to Local 669 dated March 8, 1994, reading:

Following is a reply to your letter dated February 7, 1994.

As stated in our letter to you dated January 28, 1994, "Automatic" Sprinkler has made a good faith business decision to has made a good faith business decision to permanently and unequivocally alter the basic direction of our business whereby we will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair or service of automatic fire control systems.

We will subcontract the labor needed to conduct the installation, alteration, maintenance, repair or service of automatic fire control systems to a contractor that has a collective bargaining agreement your Union, per Article 18 of the current collective bargaining agreement.

In our letter to you dated January 28, 1994, we offered to negotiate in good faith with you concerning this business decision and its effects on those

employees affected by the decision.

In approximately the Fall of 1992, we began to reexamine our manner of conducting business in the hopes of making the enterprise more competitive and thus more profitable. "Automatic's" President, Owen Stout ("Stout"), concluded that the Company's direction and operations had to change to make these goals possible. He concluded that it would be more cost efficient for "Automatic" to cease providing its own labor force, in favor of becoming a general contractor which would acquire the labor force required for its contracts through subcontractors. Stout believed that smaller sub contractors could be more competitive with their labor estimates. Stout, however, not wanting to alienate the Union nor wanting to violate the collective bargaining agreement, decided that the Company would sub contract only with construction companies that were parties or signatory to labor agreements. In order to implement this plan, the Company decided that it would have to withdraw from NFSA and, furthermore, that it would not renew all of its labor contracts with the various locals.

Stout discussed the Company's goals and the fundamental change in the Company's operations in early March 1993 with Vern Simpson, the Business Manager of Local 669 which was a party to a collective bargaining agreement with NFSA/"Automatic" covering sprinkler fitters throughout the Country wherever autonomous Locals of the Internationals, had no jurisdiction. A memorandum concerning this meeting which sets forth the Company's planned changes in operations was circulated to all of "Automatic's" District Managers on March 8, 1993.

"Automatic" took the first step in implementing this

new operating plan in early February 1993 when it formally withdrew from NFSA. In a memorandum to all District Managers dated February 11, 1993, Stout explained his reasons for the withdrawal (copy enclosed). Stout decided that the Company's withdrawal from NFSA would allow it to work more closely with the Locals and thereby prepare them for "Automatic's" upcoming changes in operations. Although "Automatic" would no longer be employing members of the Locals directly, it would be employing their members through subcontractors and therefore the Company desired a closer, mutually beneficial relationship with both the Locals and their members. "Automatic" has not rejoined NFSA since its withdrawal in February 1993.

During approximately this same period of time, "Automatic" began formatting its subcontracting procedures. The Company developed a "form" subcontract agreement to be used in the purchase of sprinkler fitter labor. The form agreement, among other things, required that the subcontractor be a party or signatory to a collective bargaining agreement. The contract also contained warranty, payment, insurance and liability provisions. The subcontract form, with attached documents, has come to be known as the "S Order" at "Automatic". The "S Order" was circulated to all of "Automatic's" District Managers on June 29, 1993 (copy enclosed).

In March 1993, "Automatic" began the next phase of its reorganization. In the period between March 31, 1993 and September 15, 1993, collective bargaining agreements between NFSA/"Automatic" and Local 183 in Milwaukee, Local 483 in San Francisco, Local 709 in Los Angeles and Local 550 in Boston expired. By

the time of the expiration dates of the contracts in those areas. "Automatic" had successfully transformed its operations in each area into that of a general contractor and, as a result, no longer employed members of these Locals. Instead, all of the Company's labor needs were provided for by union subcontractors with the end result being mutually beneficial: "Automatic" had successfully reorganized and union members did not lose any work.

Since May 20, 1993, "Automatic" has begun to bid all of its prospective contracts in Local 669's jurisdiction as a general contractor with the intention of subcontracting the labor requirements. Projects awarded to "Automatic" have already been or will soon be subcontracted by "Automatic" in accordance with the subcontracting provisions of the current agreement between it and Local 669.

"Automatic" has taken all steps necessary to changes its operations from that of being a direct employer of sprinkler fitters or other members of Local 669 to that of being a general contractor that subcontracts for its labor.

"Automatic" Sprinkler has not violated and is not violating any provision of the current collective bargaining agreement by subcontracting the labor on our projects. We will not cease and desist from implementing our business decision.

Enclosed and listed below are all documents that we deem relevant. There are no Corporate resolutions nor similar documents which reflect this decision making process.

02-05-93--Internal memo about withdrawal from NFSA.

02-10-93--Letter to NFSA about withdrawing

membership.

02-11-93--Letter to Figgie International concerning "Automatic's" withdrawal from NFSA.

02-11-93--Form letter that was sent to all unions (including 669) concerning "Automatic's" withdrawal from NFSA.

02-11-93--Memo to all District Managers advising them to meet with Business Agency to explain our business decision.

03-08-93--Memo to all District Managers concerning a meeting between "Automatic" and 669's Business Manager, Vern Simpson.

04-05-93--Letter to 669 members from Vern Simpson, Business Manager, Local 669.

04-23-93--Memo to Calfee, Halter, & Griswold about Labor Subcontracting.

05-26-93--Memo to all District Managers transmitting copy of Procedure 8-2 on Subcontracting Labor.

06-28-93--Procedure 8-2 rewritten and revised as Procedure 8-5, Subcontract Labor.

01-28-94--Letter to 669 concerning "Automatic's" business decision.

02-07-94--Letter from 669 responding to "Automatic's" 1-28-94 letter.

02-15-94--Letter to 669 with "Automatic's" response to 2-7-94 letter.

In the event that you desire to discuss this business decision and the effects thereof on members of your Union who are or were employed by "Automatic" Sprinkler Corporation of America, please give me a call. You may be assured the Company will negotiate in good faith with you concerning this business

decision and its effects on those employees affected by the decision.[3]

By letter of April 22, 1994, Local 669 requested Respondent to furnish, among other things, the information listed in the following questionnaire:

QUESTIONNAIRE

Please provide the following information for "Automatic" Sprinkler Corporation of America ("Automatic"), American LaFrance Fire Protection Company ("American LaFrance"), Figgie International ("Figgie") and any other companies affiliated with those organizations for the time period January 1, 1991, unless otherwise stated:

1. The date and State of incorporation of each company.
2. All past and present office addresses and telephone numbers of each company office and facility, and the dates thereof.
3. The office address and employment history (including job titles and responsibilities), for the period January 1, 1991 to date, of a) each present company officer and/or director and b) each former company officer and/or director who was employed at any time during that period.
4. The name and employment history (including job

[3]In March 1994, Local 669 commenced a series of requests for information on various items unrelated to the issues raised by Respondent's January 28, 1994 letter to Local 669. The requests are not relevant to those issues and are therefore not here considered.

titles and responsibilities) of each current or former director, officer, supervisor, and/or employee of any of the companies who at any time since January 1, 1991 has been or was employed by any of the other companies in any capacity.

5. The State or States in which each company has been and/or is qualified or registered to do business, and the dates the company has so qualified or registered.

6. The names under which each company trades or does business, or has traded or done business.

7. The names and addresses of all persons, corporations or other entities owning stock (and the percentage of their ownership) in each company as of January 1 of each year from 1991 to date.

8. The nature of the business of each company, including products, services, customers and locations of manufacturing, fabricating and/or sales facilities.

9. The name, title, employer and job duties of any persons who are, or who have been, responsible in any way for labor relations and/or personnel relations for each company, the period of time during which each of these persons was assigned these responsibilities, and each person's employer during each such period of time.

10. The name, title, employer of each person who had, or has responsibility for hiring, firing and Supervising employees in each company, the period of time during which each of these persons was assigned these responsibilities, and each person's employer during each such period of time.

11. Do the companies, jointly or in common, own, occupy, or lease real property? If so, the location of

the real property and the terms of the lease.
12. Do the companies use or lease real property of any of the others? If so, the location of the real property and the terms of the lease.
13. Do the companies, jointly or in common, own, or lease facilities and/or equipment? If so, the type and location of these facilities and equipment and the terms of the lease or other agreement for use.
14. Do the companies lease or use facilities and/or equipment of any of the others? If so, the type and location of these facilities and equipment and the terms of the lease or other agreement for use.
15. Do the companies own, jointly or in common, bank accounts, notes, bonds and/or types of securities? If so, the type and monetary value of the bank account and/or security. real property? If so, the location of the real property and the terms of the lease.
16. The date, terms, and parties to each contract, commitment of understanding, whether oral or written, under which the companies have been and/or are jointly obligated to engage in business activity.
17. The date, terms and parties to each contract, commitment or understanding, whether oral or written, between the companies under which one of the companies has been and/or is required or authorized to use the services, facilities, personnel, or equipment of the other company.
18. The date, terms, parties to and persons entering into each contract, commitment, or understanding, whether oral or written, between the companies.
19. The date, terms, parties to and persons entering into each contract, commitment, or understanding,

whether oral or written, under which one of the companies agreed to loan, sell and/or contribute equipment, services, money and/or any other things of value to the other company.

20. The date and substance of each bid submitted by one company for work to be performed in whole or in part by the other company.

21. The date and substance of each contract entered into by one company for work which was, or is being performed in whole or in part by the other company.

22. The identity of each person or entity that guaranteed or bonded the performance of each contract entered into by any of the above-named companies.

23. The name, effective, dates, terms and class of eligible employees, supervisors, officers and/or directors of each health, life insurance, pension, incentive, stock option, retirement and/or similar benefit plan offered by each company and whether employees, supervisors, officers and/or directors of each health, life insurance, pension, incentive, stock option, retirement and/or similar benefit plan offered by each company and whether employees, supervisors, officers and/or directors of one company participate in, or are eligible to participate in the plan of another company.

24. The nature and terms of any lines of credit, revolving credit or other credit arrangements offered by one company to the other company, the dates on which such credit was extended, the amount of credit extended, and the parties to each extension of credit.

25. The nature and amount of indebtedness owned

by each company to any of the other companies on January 1 of each year from 1991 to date.

26. The dates, participants and substance of each meeting, conference and/or discussion attended by one or more shareholders, directors, officers, supervisors and/or employees of Automatic and/or Figgie at which the formation and/or function of American LaFrance was discussed.

27. Copies of those portions of all documents, including but not limited to correspondence, memoranda, notes, and minutes, which refer, directly or indirectly, to the formation, dissolution, and/or function of American LaFrance.

28. Identify the banking institution, branch location, and account number of each company's bank account and payroll accounts.

29. Identify where and by whom each company's accounting, corporate and other business records are kept.

30. Who prepares the payroll and tax returns for each company?

31. Provide each company's business license number for each state where it does business.

32. Provide the carrier and policy number for each company's workers' compensation insurance and health insurance.

33. Provide each company's taxpayer identification number.

34. Provide the name, social security number, date of hire, wage and fringe rates for each employee of American LaFrance that has performed or that is performing bargaining unit work, since January 1, 1991.

That same day, John Gullo, Respondent's director of human resources forwarded a copy of Pro Forma III-A to Local 669. Gullo is credited that he had not previously furnished Local 669 the document because he was unaware of the document's existence. This is not implausible given the fact it was prepared in limited copies and distributed to a very few high-level officials before Gullo entered his position as director of human resources.

Tommy Preuett, Trustee of Local 669, responded to Gullo's April 22, 1994 submission on May 11, 1994, as follows:

> In reply to your letter of April 22, 1994 we seriously doubt that you have provided all of the information requested by Local 669. No substantive response has been received with regard to the Union's request dated April 22, 1994 having to do with American LaFrance. We also request that you re-review your files to see if any other responsive documents have been "inadvertently overlooked."
>
> With respect to the newly provided document, "PRO-FORMA III-A," is it a complete document? When was it prepared and by whom? Were there PRO-FORMA's I or II or III-B? What specific actions have been taken by "Automatic" and/or Figgie International, to achieve the goals and/or objectives set forth in the documents that you have provided us with, including PRO FORMA III-A?
>
> Any additional documents regarding the "Neutral Plan" in your files or in those of Figgie International are requested.
>
> Thank you for your cooperation.

This moved Gullo to respond as follows on May 19, 1994:

Reference: Your letter dated 05-11-94
Dear Mr. Preuett:

We have responded to your letter dated 04-22-94. via our letter dated 04-29-94. In our letter, we answered your questions regarding American LaFrance Fire Protection (a business segment of Interstate Engineering, a division of Figgie International) and included a response to your questionnaire. In your letter of 05-11-94, what specifically is it that you are alleging we did not respond to?

There is no need for me to AGAIN re-review our files for any documents. I stated in my April 22, 1994 letter to you that I had already done this. That is how I located the document titled "PRO-FORMA III-A, NEUTRAL OPERATIONS". Your request that I AGAIN review documents and files already reviewed is burdensome and I believe an attempt by you to waste my time and resources.

Regarding the document "PRO-FORMA III-A, NEUTRAL OPERATIONS" it is a complete document. The only part of the document that I did not provide to you is a Profit and Loss Summary due to the Neutral Operations Plan, for the years 1993 through 1997. This document contains confidential and proprietary financial information, which you have no need of, nor right to.

The document "PRO-FORMA III-A," was prepared in the November 1992 by the President and Controller of "Automatic" Sprinkler.

"PRO-FORMA III" is just a numbering scheme developed by Figgie International for identifying projects within the divisions. The number scheme is as follows:

PRO-FORMA I--These are projects that involved

the consulting firm of Boston Consulting Group. "Automatic" Sprinkler had no such projects.

PRO-FORMA III--These are projects that involved the consulting firm of DeLoitte & Touche. "Automatic" Sprinkler had no such projects.

PRO-FORMA III--These are projects that were being handled solely by the given division. "Automatic" Sprinkler had no three projects: PRO FORMA III-A, Neutral Operations Plan; PRO FORMA III-B, Service Operations Plan; and PRO FORMA III-C, International Expansion Plan, PRO FORMA III-B and C are not related to any union nor labor relations and are therefore, not provided to you.

PRO-FORMA IV--These are projects that involved capital expenditures, "Automatic" Sprinkler had no such projects.

Regarding your question about "What specific actions have been taken by "Automatic" ... to achieve the goals and/or objectives set forth...", I suggest you re-read all the correspondence and information we have been supplying to you. The correspondences and information state what actions "Automatic" has and is taking.

Please advise if you are available to meet and discuss the terms and conditions of a unit of employees restricted to welders at the Monroe, Indiana fabrication shop of "Automatic" Sprinkler and whether you wish to meet to discuss the specific aspects of the "Automatic" business plan which are appropriate for purposes of collective bargaining.

Local 669's above-noted requests for information to ASCOA are reasonably related to Local 669's function as a collective-bargaining representative and to union contract

enforcement and must therefore be produced.[4] I am inclined to agree with Respondent that it had in considerable part responded to Local 669's requests referred to in the complaint and detailed above, but the refusal to furnish Pro Formas III-B and C, which are part of the "Neutral plan" and thus of use to Local 669 in evaluating the situation confronting it, was an impermissible refusal to furnish relevant information. I have noted that Local 669, simultaneously with these requests, was asking for information on various and sundry other matters, all of which seemed to have been appropriately replied to.

Thereafter, Local 669 and Respondent continued to exchange letters concerning Respondent's disposition of its sprinkler fitters. The Respondent requested negotiations, but none took place. Although the letters of Respondent to the various charging Locals proposed bargaining on Respondent's decision to subcontract all the collective-bargaining unit's work and its effects on union member employees, it is absolutely clear from the many statements and letters of Respondent, as well as its answers to complaints issued, that Respondent always took the position its decision was irrevocable and not a bargainable issue. Respondent did, however, offer to bargain over the effects of its action. This was not acceptable to Local 669 or any of the other Charging Locals, thus the matter came before me for trial.

Local 120

ASCOA President Owen Stout directed the following letter to Lawrence Smith, financial secretary-treasurer of Local 120, on January 28, 1994:

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[4] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

> This is to serve notice that "Automatic" Sprinkler Corporation of America intends to terminate the Agreement presently between it and your Union, effective with the termination dated April 15, 1994. You are further notified that "Automatic" Sprinkler Corporation of America has made a good-faith business decision to permanently and unequivocally alter the basic direction of its business whereby it will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair and service of the "Automatic" Sprinkler fire control systems. It is the intention of "Automatic" Sprinkler Corporation of America to implement that fundamental change in its business effective April 1, 1994. In the event that you desire to discuss this business decision and the effects thereof on members of your Union who are or were employed by "Automatic" Sprinkler Corporation of America, please give me a call. You may be assured the Company will negotiate in good faith with you concerning this business decision and its effects on those employees affected by the decision.

Smith replied to Stout's letter on February 7, 1994, as follows:

> Pursuant to the provisions of the Labor Management Relations Act, as amended, and Article XVII, of the existing labor agreement with this Union, you are hereby notified that the Union wishes to discuss with you the renewal, with modifications of our existing agreement, effective as of May 1, 1994. If renewal of the labor agreement or a new agreement is not entered into by that date, this constitutes notice that the Union reserves the right to take such legal action as

the law permits.

This does not constitute an intent to hereby terminate the existing Welfare and Pension Plans established by Employer contributions pursuant to separate agreements and declarations of trust.

The Union offers to meet and confer with you for the purpose of discussing these modifications, kindly acknowledge receipt of this communication indicating a time and place for said meeting.

ASCOA director of human resources John Gullo replied to Smith's letter on February 15, 1994, as follows:

In reply to your February 7, 1994 letter offering to meet and confer with us for the purpose of discussing modifications to the collective bargaining agreement, we refer you to our letter dated January 28, 1994, in which we advised you of the Company's intention to terminate the agreement effective with its termination date.

As stated in our letter to you dated January 28, 1994, "Automatic" Sprinkler has made a good faith business decision to permanently and unequivocally alter the basic direction of our business whereby we will no longer employ persons represented by your Union in the installation, alteration, maintenance, repair or service of automatic fire control systems.

In our letter dated January 28, 1994, we offered to negotiate in good faith with you concerning this business decision and its effects on those employees affected by the decision.

Our legal counsel is out of town until next week. When he returns, we will contact you regarding a time and place to meet to discuss the effects our business

decision will have on those employees affected by the decision.

Thereafter, representatives of Respondent and Local 120 met on March 29, 1994, and discussed a contract termination agreement In April 1994, their lawyers exchanged drafts of such an agreement, but no such agreement acceptable to both parties was reached.

Local 692

Respondent sent the same January 28, 1994 letter to Local 692 as it did to Local 120, with the single exception being a contract termination date of April 30, 1995.

John Gallagher, the business manager of Local 692, credibly testifies this was the first notice he received from ASCOA with respect to the information the notice contained regarding ASCOA's termination of its contract agreement with Local 692 and that ASCOA would no longer employ members of Local 692 to do its sprinkler fitter work (there is no mention of subcontracting in the letter). He recalls, however, that Respondent did subcontract two jobs in February 1994, to two contractors signatory to the Local 692 collective-bargaining agreement.

Local 536

After receiving the same January 28, 1994 letter with the correct contract expiration date of May 31, 1994, for Local 536 Robert Fique, the business manager and financial secretary-treasurer of Local 536, sent a letter to Harry Figgie Jr., chairman of the board of Figgie International, but did not get a reply from him. ASCOA did, however, send him a letter

requesting negotiations. Fique in his response agreed to this request. Respondent in turn sent Fique another letter, this time confirming a negotiations' meeting date of April 28, 1994. He is credited that this was the first time Respondent told him of its decision not to use Local 536's members for its sprinkler work.

Fique met with Respondent's attorney Donald Woodcock, ASCOA's director of human resources Gullo, and ASCOA's Baltimore district manager Arthur D. O'Neil on April 28, 1994, at Respondent's Baltimore office. Fique insisted Respondent restore his union's collective-bargaining unit before any negotiations begin. All but 2 of the 14 Local 536 members employed by ASCOA had by then been laid off. Respondent, by Attorney Woodcock, took the position it did not have to reinstate the laid-off employees. Presented with a contract termination agreement from Attorney Woodcock, Fique refused to sign it. The meeting ended with the parties maintaining the same positions they started with. There have been no further negotiations between Local 536 and Respondent.

Local 542

Ralph Boss, business manager of Local 542, also received Respondent's January 28, 1994 letter, informing him that Respondent was going to terminate its contract agreement with Local 542 upon expiration of their contract. Local 542's contract expiration date was June 30, 1994. Boss called ASCOA president Owen Stout and asked for an explanation why Respondent planned to terminate the agreement. Stout told him Respondent's new plan was a business decision. On April 5, 1994, Personnel Director Gullo wrote Boss advising his (Gullo's) letter of January 28, 1994, was notice to open negotiations regarding Respondent's "business decision and the

effects thereof on your members." As I have heretofore noted, this language is misleading because Respondent had always regarded its decision to terminate its contract agreements with all the unions to be final and not subject to negotiating. All Respondent was really offering, as its contacts with Local 542 and the other locals demonstrate, was a contract termination agreement and effects bargaining.

Boss and Jack Braun, a member of the Local 542 negotiating committee, met with ASCOA human resources director Gullo, Respondent's attorney Woodcock, and Figgie's manager of employee relations David R. Gross on May 2, 1994, at the Union's office. Boss was presented with a contract termination agreement which, like that presented to the other affected Locals, proposed (1) termination of the collective-bargaining relationship, as of June 30, 1994, (2) continued recognition of the Union until all bargaining unit members were terminated, (3) continuance of employee benefit programs in accordance with the terms of the existing contract, and (4) good-faith efforts by Respondent to secure the affected employees employment elsewhere with Respondent's subcontractors. Boss advised he would forward the document to his lawyer. The termination agreement was never agreed to. When Boss inquired if subcontracting would be confined to union contractors, Attorney Woodcock replied it would not. There was no change in Respondent's position, nor were there any agreements reached between the parties.

Local 281

Thomas Collins, business manager of Local 281, received the same January 28, 1994 letter except for the contract termination date, which was May 31, 1994 for his union. He is credited that during a one-on-one meeting with ASCOA

President Owen Stout on February 7, 1994, Stout confirmed ASCOA would subcontract its sprinkler fitter work.

Business Manager Collins and his legal counsel met with Respondent's Representatives Gullo, Gross, and Woodcock on April 27, 1994. He refused to sign the contract termination agreement Attorney Woodcock presented to him. He was advised, as were the others present, that Respondent had no plans to sign any new collective-bargaining agreement and would be subcontracting its sprinkler fitter labor work. Collins urged that Respondent consider the Union's new agreement with NFSA that was about to be completed and would permit employer subcontracting. Respondent agreed to take a look at the agreement Local 281 would reach with NFSA. Collins agreed to submit the successor agreement to Respondent for consideration on its completion, and subsequently did so. There was no response from Respondent's representatives after Collins sent the NFSA contract to them for review. There were no further meetings of Local 281 and Respondent on the matter.

Local 314

The January 28, 1994 letter to Local 314 was the same as the others except for a contract expiration date of June 30, 1994. According to Michael Poston, the business manager of Local 314, Respondent's contract with his local had an Evergreen clause and rolled over and therefore did not expire. I need not decide this issue. Poston states the January 28, 1994 letter was the first notification he had received that Respondent was not intending to use members of Local 314 to do its sprinkler fitter work. He next received an April 5, 1994, letter from Gullo purporting to be a notice to open negotiations on Respondent's business decision to permanently terminate its

contract agreement with his union and its effects on members of Local 314. After some communications between Gullo and Poston concerning a meeting date, Local 314's attorney advised Gullo by FAX on April 28, 1994 that the Union did not recognize the legality of Respondent's business decision and that a condition precedent to effects bargaining would be the restoration of the status quo ante. That ended the communications between the two parties.

Local 699

Stout's January 28, 1994 letter to Local 699, showing a contract termination date of June 30, 1995, drew a response from Local 699's attorney requesting discussion of the Respondent's decision and its effect on Respondent's Local 699 member employees. There were no further communications between the parties according to Donald Ellefson, business manager of Local 699.

Local 696

After receiving ASCOA's President Stout's January 28, 1994 letter, which noted a contract expiration date of June 30, 1994, for Local 696, a meeting was scheduled. Richard Hodavance, business manager of Local 696, two business agents of the Local, and its attorney met with Respondent's representatives Gullo, Gross, and Respondent's attorney Woodcock on May 12, 1994. After Attorney Woodcock explained Respondent's decision to subcontract sprinkler fitter labor, Hodavance asked if Respondent's subcontracting would be limited to union contractors. Attorney Woodcock's response was that Respondent would not do so, but would subcontract to reputable contractors. Local 696's attorney asked if Respondent would enter into a collective-bargaining agreement requiring

Respondent's subcontracting be to contractors that are Local 696 signatories. Respondent declined to so do. Attorney Woodcock suggested ASCOA might be amenable to project agreements. Hodavance stated Local 696 had not and would not enter into project agreements. To this statement Woodcock replied that if that was the case, ASCOA would not employ any Local 696 employees and would subcontract labor from other contractors.

There was some discussion of severance pay for members of Local 696 employed by ASCOA. No agreement was reached on this or other substantive matters.

Local 483

Local 483's contract agreement with ASCOA expired August 1, 1993. Respondent, on July 30, 1993, laid off all of its employees in the collective-bargaining unit represented by Local 483, and refused to negotiate a successor agreement with the Local. Nevertheless, ASCOA President Stout sent the following communications to Local 483, which suggest Respondent considered itself bound to Local 483 by a subsequent extension agreement between Local 483 and Castle Sprinkler Company.

November 28, 1993
Mr. Lloyd C. Barton Business Manager Sprinkler Fitters & Apprentices, Local 483
23314 Cabot Boulevard
Hayward, CA 94545

RE: "Automatic" Sprinkler Corporation of America

Dear Mr. Barton:

As of July 1, 1993, "Automatic" Sprinkler Corporation of America had entered into a

joint-employment relationship with Castle Sprinkler Company. Castle simultaneously offered employment to all "Automatic" fitters employed at that time for which there was available work. On behalf of the joint-employment relationship, Castle Sprinkler Company has since entered into an extension of the collective bargaining agreement with Local 483 that it and "Automatic" were signatory to. It seems to me that collective bargaining agreement is in full force and effect as to "Automatic." Inasmuch as "Automatic" Sprinkler Corporation of America is deemed a signatory by virtue of the actions of its joint-employer to that contract, then the union is also bound to the same terms and conditions with "Automatic."

In the event that you desire to discuss this joint employment relationship and the effect it has had on "Automatic's" former employees and your union, please feel free to give me a call.

"Automatic" Sprinkler Corporation of America

Very truly yours,
Owen G. Stout,
President

and:

November 30, 1993
Mr. Lloyd C. Barton
Business Manager
Sprinkler Fitters & Apprentices Local 483
23314 Cabot Boulevard
Hayward, CA 94545

RE: Picket Line at Dixon University, Harrisburg, PA Job Site

Dear Mr. Barton:

We have been notified that your local has established a picket line at our jobsite in Harrisburg, PA.

The picket line and strike is in violation of the agreement between "Automatic" Sprinkler Corporation of America-Castle Sprinkler Company and your local.

As stated in our letter to you dated November 29, 1993, as of July 1, 1993, " Automatic" Sprinkler Corporation of America had entered into a joint-employment relationship with Castle Sprinkler Company. On behalf of the joint-employment relationship, Castle Sprinkler Company has since entered into an extension of the collective bargaining agreement with Local, 483 that it and "Automatic" were signatory to.

Inasmuch as "Automatic" Sprinkler Corporation of America is deemed a signatory by virtue of the actions of its joint-employer to that agreement, then the union is also bound to the same terms and conditions with "Automatic".

We request that you please remove the picket line promptly. Your failure to do so will necessitate legal action. We hold your local strictly liable for any damages and costs we may incur due to this illegal action.

Very truly yours,
Owen G. Stout
President

Barton wrote to President Stout on December 1, 1993 disputing, among other things, ASCOA's theory that ASCOA and Castle Sprinkler Company were joint employers. After further exchanges, Gullo wrote Barton on April 22, 1994, as

follows:

Dear Mr. Barton:

The complaint by the National Labor Relations Board referenced in your April 13 letter, among other things, contends that "Automatic" Sprinkler Corporation of America (ASCOA) and Castle Sprinkler Company are joint employers of certain employees, who are members of your Union and are covered by a Collective Bargaining Agreement. ASCOA has acknowledged that certain facts could support that theory and on that basis contends that its joint employer, (under the theory espoused by your Union and the National Labor Relations Board), Castle Sprinkler Company has entered into a Collective Bargaining Agreement with your Union for a one (1) year term which expires July 31, 1994.

This being so, employees of ASCOA have been employed, consistent with its business operations, by its joint employer, Castle Sprinkler Company. Accordingly, there is no basis for reinstating and making whole employees who were not terminated but were simply transferred from the payroll of one joint employer to the payroll of another; a mere administrative detail unrelated to the actual employment status of the employees.

ASCOA has now determined that it desires to terminate any such joint employment relationship with agreement with Castle Sprinkler Company, as alleged, or any other sprinkler company, effective August 1, 1994.

Meanwhile, ASCOA believes it is important that the parties meet to discuss these important issues. Please provide me with all of your available dates for a

meeting during the months of May and June for the purpose of discussing the termination of the joint employment relationship between ASCOA and Castle Sprinkler Company and the negotiations of the subcontracting of installation and repair work; and the decision and the effects of that decision on the ASCOA/Castle Sprinkler Company employees.

Local 676

ASCOA president Stout's January 28 letter to Local 676 noted its contract expiration date was July 31, 1994. The Local's counsel on April 6, 1994, requested subcontracting information from Stout. This request was replied to by Gullo's letter of April 8 containing information of the nature requested. Pursuant to a further request from Local 676, Gullo furnished the Local with additional information. Local 676 then withdrew a charge it had filed on April 18, 1994, alleging a refusal of Respondent to provide the Union the information it had requested.

Local 709

On May 26, 1993, Stout wrote James Duffy, Business Manager of Local 709, that the Local's contract would terminate on September 1, 1993, in accordance with its terms. Thereafter, Local 709 negotiated a contract extension date to August 31, 1995, with NFSA. By virtue of its earlier withdrawal from NFSA, the Respondent was not party to this extended agreement and declined to agree on an extended agreement with Local 709. The members of the bargaining unit at ASCOA represented by Local 709 were laid off on August 31, 1993. Many, if not all of the members, were then employed by a union employer who was the subcontractor succeeding to

the same kind of sprinkler fitter labor previously done by ASCOA with the aforesaid unit members.

Duffy subsequently met with Stout in November 1993. Stout then told him, as had Michael May, ASCOA's operations manager in Los Angeles, in August 1993, that ASCOA was subcontracting its sprinkler fitter labor. Duffy credibly states May also told him in February 1993, when May was the district manager for ASCOA in Los Angeles, California, that Respondent had a 5-year plan to become a general contractor. May added he did not know what that meant, but that was what he had been told.

A memo from Gullo to Respondent's counsel and manager of employee relations, Gross, dated June 8, 1994, relates the following concerning Duffy's November 10, 1993 meeting with Stout:

> On or about November 10, 1993, Duffy did visit our Broadview Heights office to informally meet with Stout. They discussed the construction market in Los Angeles. The general feeling was that the market was very bad and would not likely improve in the near future.
>
> Stout explained to Duffy our plan to subcontract our labor.
>
> Duffy asked if "Automatic" would be willing to sign a collective bargaining agreement with local 709. Stout remarked the this was a subject that needed to be discussed in formal negotiations and was not something he could commit to without discussion with individuals at Figgie International.
>
> That is all Stout recalls regarding the meeting.

Gullo's memo in this regard is reliable hearsay with probative worth. American Art Clay Co., 148 N.L.R.B. 1209, 1219 fn. 16 (1964).

Respondent has refused to negotiate successor bargaining agreements with all of the Charging Locals.

After termination of the various Local's contracts, a number of the ASCOA employees who had lost their jobs with the implementation of the "Neutral Plan" became subcontractors to ASCOA with the aid of ASCOA including the use of vehicles and other equipment which the subcontractors bought or leased from Respondent. Some of ASCOA's new subcontractors undertook that role at the suggestion and encouragement of ASCOA officials who were instructed to so do by their superiors. Many other employees became employees of subcontractors. This is not surprising given the special expertise they possessed in sprinkler fitting. Other unit employees became salaried inspectors for ASCOA.

B. Discussion and Conclusions

1. The refusal to furnish information

The Board in W-L Molding Co., 272 N.L.R.B. 1239, 1240 (1984), succinctly summarized the law applicable to situations like that here presented in the following terms:

> [A] broad discovery-type standard is applicable to requests for information relevant to a union's functions of negotiating and policing compliance with a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *General Motors v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983);

> *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). "It is not the Board's function in this type case to pass on the merits of the Union's claim that Respondent breached the collective bargaining agreement or . . . committed an unfair labor practice." *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957. "Thus, the union need not demonstrate actual instances of contractual violations before the employer must supply information." *Boyers Construction Co.*, 267 N.L.R.B. 227, 229 (1983). "Nor must the bargaining agent show that the information which triggered its request is accurate, nonhearsay, or even ultimately reliable." *Ibid.* "The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957 quoting *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. Accord: *General Motors v. NLRB*, 700 F.2d at 1088. [Footnote omitted.]

The facts before me suggest the Union's requested and denied information is arguably relevant and would be of use to Local 669 in its role as a collective-bargaining representative of Respondent's employees. The failure to completely provide that information therefore violated Section 8(a)(5) and (1) of the Act as the complaint alleges.

With respect to Respondent's suggestion that Local 669's numerous requests for various other information unrelated to the requests at issue herein were intended to hinder or impede Respondent in the negotiating process and therefore caused Local 669 to lose any statutory right it had to the information here requested, citing *NLRB v. Wachter Construction*, 23 F.3d

1378 (8th Cir. 1994), I first note with respect that I am bound to follow Board precedent,[5] and here the Board disagreed with the circuit court.[6] Moreover, the record in the instant case shows no persuasive evidence other than the bulk of the requests (to which Gullo responded with no apparent difficulty) to support a harassment theory whereas *Wachter* contained clear evidence of deliberate harassment by a union official. There is no solid evidence that Local 669 was posing its various requests for the purpose of harassment or that its requests, which were largely responded to, were irrelevant to any legitimate union concern. That Respondent may suspect harassment does not make it so.

2. The "Neutral Plan," its purposes and implementation

Respondent would have me believe that the development and implementation of the "Neutral Plan" was pure as driven snow, free from discriminatory intent, and a fundamental change in Respondent's business. Exceptionally able counsel for the Respondent skillfully argued that conclusion. I cannot agree, although I admire the advocacy. Reduced to its simplest terms, what we have here is a Respondent eager to dispose of union representation of its employees and the resulting bargaining agreement restricting it from freewheeling in its contracting for the installation of its product. Pro Forma III-A clearly demonstrates Respondent's dislike of the restrictions imposed on it by union representation of its employees, and its desire to be a union-free employer. Respondent had contemplated the possibility of going nonunion for some time

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[5] *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615 (1963).

[6] *Wachter Construction, Inc.*, 311 N.L.R.B. 215 (1993).

prior to its adoption of the "Neutral" plan, and after some misgivings, took the plunge. Thereafter, as its messages to its supervisors and its assurances to union agents of continuing relations demonstrate, Respondent went to considerable pains to mislead the unions into believing that it was merely extending its subcontracting. The suspicion of Business Manager Simpson of Local 669 and others that Respondent was up to something more, and the advice ASCOA's president, Stout, gave to Duffy after Respondent had laid off all of its Local 709 employees that it would henceforth be a general contractor, are no substitute for Respondent's prior notice of its real intent to be nonunion. Respondent had carefully avoided any overt subcontracting to nonunion employers prior to its January 28, 1994 notice of intention to destroy all its union sprinkler fitter units as circumstances permitted, i.e., contract terminations, even to the extent of misleading its district managers via its February 11, 1993 memo assertion the new program would force Respondent to work directly with the Unions for the benefit of both. Its concealment commenced with its notice to NFSA that it intended to bargain individually with the Unions, continued with its reassurances to Simpson that there would be contractual relationships with Local 669 in the future, and its care in avoiding overt nonunion connections until its dramatic announcement of January 28, 1994. That announcement itself was designed to mislead the Unions. It invited bargaining on Respondent's decision to no longer employ the Locals' members, but the record clearly shows Respondent had no intention of bargaining on its decision. All Respondent was willing to do was discuss the effects of its decision on the laid-off employees and secure a written agreement from the Unions to terminate its collective-bargaining relationships.

3. Affirmative defenses

Respondent raises several defenses to justify its behavior. It contends that clauses in the various collective-bargaining agreements permitting Respondent to subcontract to other employers who have collective-bargaining agreements with the unions constitute waivers of bargaining rights concerning subcontracting during the term of those agreements. Although the clauses do permit subcontracting to other employers signatory to incumbent unions' agreements, they certainly do not permit subcontracting to nonunion firms, nor do they prohibit bargaining on subcontracting upon the expiration of the collective-bargaining agreements. They do not waive the right to bargain over a decision to destroy bargaining units through the use of subcontracting or the implementation of such a decision.[7]

The Respondent also contends the Union's waived their rights to bargain over Respondent's decision by failing to request bargaining after learning of Respondent's "General Contractor Decision" throughout the course of 1993. The fact is that all the Unions really knew was that there was an increase in subcontracting by Respondent in some areas. Respondent deliberately concealed its decision to totally sever connections with the Unions until January 28, 1994, and even then, as above noted, falsely advised the Unions its decision was bargainable. I do not believe the Unions were required to decipher the various conflicting signals given them by the Respondent or its unrevealed intentions. It was Respondent's

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[7]Respondent's reliance on *Mine Workers District 31 v. NLRB*, 131 L.R.R.M. 3131 (D.C. Cir. 1989), is misplaced because the facts in that case bear no resemblance to those presently before me.

obligation to promptly and completely advise the Unions of its plans to no longer hire union member sprinkler fitter laborers when its plans were solidified if it expected the Unions to request bargaining on the decision. By depriving the Unions of such prompt knowledge and embarking on a course of deception, the Respondent forfeited any claim it might have otherwise had that the Unions waived their rights to bargain on its decision.

Respondent further urges that the Charging Parties waived the right to bargain on the "General Contractor Plan" by failing to respond to Respondent's requests to bargain with them accompanying its written notices of implementation of its plan. The quick response to this assertion is that a party is not required to engage in a futile act. The record firmly establishes that the Respondent had absolutely no intention of bargaining about the "Neutral Plan." The Unions did not waive bargaining rights by failing to take part in Respondent's charade.

The argument of Respondent that, because Locals 120, 542, 696, and 676 had an 8(f) agreement with Respondent, Respondent was free under *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), to terminate the contracting relationship at the contract's expiration date without notice or invitation to bargain is accurate, but that does not insulate Respondent from liability for conduct violative of Section 8(a)(3) of the Act I am persuaded, for reasons set forth below, Respondent's conduct was motivated by antiunion animus and violated Section 8(a)(3) of the Act with respect to all of the affected employees represented by all the Charging Unions, whether represented pursuant to a 9(a) or 8(f) arrangement.

As a separate defense, Respondent contends complaint allegations are time barred by Section 10(b) of the Act, which

provides, in relevant part, "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." It is, however, well settled that the deliberate concealment of unlawful conduct tolls the 10(b) period and the burden is on the respondent to show the charging party was clearly and unequivocally put on notice of the conduct complained of prior to the commencement of the six months period set forth in the statute.[8] Here Respondent concealed its decision to totally dispose of union representation of its sprinkler fitters until January 28, 1994. I do not believe the Unions were required to affirmatively ferret out every intention of the Respondent which it even withheld from its own supervisors, note the failure of Respondent to even advise its director of human resources, Gullo, of the existence of its Pro Forma documents until after it advised the Unions of its plans on January 28, 1994. Accordingly, I conclude Section 10(b) provides no defense to Respondent's conduct.

Concluding Findings

I agree with General Counsel that the primary aim of Respondent, as shown by the content of Pro Formas III-A and B and the concealment of its ultimate intent from not only the Unions but its own managers, was to rid itself of union representation in order to indulge itself in nonunion subcontracting. This conduct, in the words of the Supreme Court,[9] was "so inherently distractive of employee interests'

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[8]See, e.g., *Barnard Engineering Co.*, 295 N.L.R.B. 226, 249 (1989).

[9]*NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

that it may be deemed proscribed without need for proof of an underlying improper motive . . . [and] carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent."

Furthermore, General Counsel has shown that the desire to rid itself of the Local Unions, thereby discouraging union activity, was at the very least one of the motivating factors in its decision to become a general contractor and subcontract all its sprinkler installation work. Respondent therefore is obliged to show by a preponderance of the evidence it would have done so in the absence of union representation of its employees. *Wright Line*, 251 N.L.R.B. 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Respondent has not carried this burden. I therefore find Respondent's conduct in terminating its union member employees, severing its relationships with the contracting unions, turning toward nonunion subcontracting, and concealing its ultimate plan from the Unions violated Section 8(a)(3) and (1) of the Act whether the reasoning in *Great Dane*, supra, or *Wright Line*, supra is applied.

Respondent also violated Section 8(a)(5) of the Act by its conduct of not giving the 9(a) unions prior notice of and opportunity to bargain on its decision to subcontract all its sprinkler installation work and to thereby replace its union employees with those of nonunion or other more malleable employers. The Supreme Court noted in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964) that: "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment--is a statutory subject of collective bargaining." The Board has followed that precedent where the

employer's decision to subcontract does not turn on a change in the scope, nature, or direction of its business and is amenable to collective bargaining. *Executive Cleaning Services*, 315 N.L.R.B. 227 (1994); *Compu-Commnications*, 315 N.L.R.B. 216 fn. 2 (1994); *Acme Die Casting*, 315 N.L.R.B. 202 fn. 1 (1994). Contrary to Respondent's argument, all that happened here was a substitution of one group of workers to perform the work of another, and not a change in the scope and direction of the enterprise which continues to manufacture, sell, and arrange the installation of sprinkler systems which it subsequently inspects with its own employees. The only difference is that subcontractors' employees now do the same work as ASCOA's sprinkler fitters had previously done, and utilize the same vehicles, tools, and other equipment ASCOA employees had used to do the same type work. The above-quoted statement in *Fibreboard* fits this situation exactly, and Respondent's concealment of its decision and the failure of Respondent to give timely notice to the Unions of its decision and thus provide them with an opportunity to bargain when it yet had some bargaining power did not satisfy its statutory obligation. *Your Host, Inc.*, 315 N.L.R.B. No. 40, slip op. at 3 (Oct. 6, 1994). Accordingly, I find that the Respondent (Figgie and ASCOA) violated Section 8(a)(5) and (1) of the Act by adopting and implementing its decision to subcontract all its sprinkler fitter labor without giving prior notice to the 9(a) unions named in this decision and without providing them with an adequate opportunity to bargain over the decision and/or its effects on ASCOA employees. Moreover, by rejecting the requests of the Sec. 9(a) unions, whose majority status is not in question, to bargain successor agreements, Respondent again violated Section 8(a)(5).

I have previously noted that Respondent failed and refused to furnish Local 669 with certain information to which it was

entitled because that information as relevant and necessary to Local 669's function as the collective-bargaining representative of certain of ASCOA's employees and for contract enforcement efforts. I therefore now find the failure and refusal of Respondent to furnish Local 669 with that information violated Section 8(a)(5) and (1) of the Act. See *Acme* and *Truitt*, supra.

General Counsel also alleges Respondent unlawfully refused to furnish Local 669 with information, citing the following February 15, 1994 letter from Local 699's attorney to ASCOA's president, Owen Stout, as the unanswered request.

> Dear Mr. Stout:
>
> This office represents Local 699 and they have asked us to review your letter of January 28, 1994 directed to Don Ellefson, the business manager.
>
> They have requested I correspond with you to express their desire to discuss the business decision set forth in your letter and the effect thereof on the members of Local 699 who may be employed by Automatic Sprinkler. They need to clearly understand the intentions of Automatic Sprinkler and acquire as much information as possible to determine the effects on the employees and the impact on the collective bargaining agreement.
>
> They would request a meeting with you or your representative as much in advance of the April 1, 1994 date as may be possible. Please feel free to contact Mr. Ellefson directly to establish the manner and time of meeting.
>
> Your cooperation in this regard will be much appreciated.

I do not believe this letter conveys an express request sufficient

to trigger Respondent's obligation to reply. Accordingly, I find no merit in the allegation.

The termination of one McGuire and other employees specifically named as discriminatees in the complaint was caused by Respondent's implementation of its subcontracting plan, which violated Section 8(a)(5), (3), and (1) of the Act. The discharge of these employees, as well as all other sprinkler fitters terminated by Respondent in the illegal implementation, is therefore a violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent (Figgie and ASCOA) is a single-integrated business enterprise and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Local Unions enumerated in the case caption are each labor organizations within the meaning of Section 2(5) of the Act.

3. Each of the Local Unions was at all times material to this proceeding party to a collective-bargaining agreement covering a unit of Respondent's sprinkler fitters.

4. By terminating the employees represented by all the Local Unions who filed the charges in this proceeding and severing its contractual relationships with said Local Unions in order to engage in nonunion subcontracting, thereby discouraging union membership, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By unilaterally subcontracting unit work, by refusing to

bargain concerning successor agreements with Locals 669, 692, 536, 218, 314, 699, 483, and 709, and by failing to give them prior notice and an opportunity to bargain, and by refusing to bargain with them over the decision and effects of subcontracting all the work being performed for Respondent by its employees represented by said Local Unions, and by terminating said employees, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By refusing to furnish Local Union 669 with requested information that is relevant and reasonably necessary to its function as the collective-bargaining representative of a unit of Respondent's employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist and notice-posting requirements, I shall recommend Respondent be: (1) required restore all of its subcontracted operations previously performed by employees represented by the Local Unions enumerated in this Decision, whether they be Section 9(a) or 8(f) representatives; (2) reinstate all employees terminated as a result of the subcontracting, and make them whole for monetary losses caused by the subcontracting. Backpay, with interest, shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 N.L.R.B. 289 (1950), with interest computed as prescribed in *New Horizons for the Retarded*, 283

N.L.R.B. 1173 (1987);[10] (3) bargain with the 9(a) representatives concerning its decision to subcontract and its effects on unit employees and for successor agreements; and (4) furnish the information to Local 669 which I have found was unlawfully withheld. I shall also recommend a broad cease-and-desist order because of the national scope and seriousness of Respondent's unfair labor practices. *Hickmott Foods*, 242 N.L.R.B. 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Figgie International Inc. and "Automatic" Sprinkler Corporation of America, a single-integrated business enterprise, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating union-represented employees whether their representative enjoys 9(a) or 8(f) status, and unilaterally severing bargaining relationships with unions selected by employees as their sole collective-bargaining representative, in accord with Section 9(a) of the Act for the purpose of engaging

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[10]Under *New Horizons*, interest on and after January 1, 1987, is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621.

[11]If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in nonunion subcontracting, and thereby discouraging union activity.

(b) Unilaterally subcontracting unit work and failing to give prior notice and an opportunity to bargain to the Section 9(a) representatives over the decision to and effects of subcontracting aforesaid first hereof.

(c) Refusing to furnish Local 659 with requested information relevant and reasonably necessary to its function as the collective-bargaining representative of Respondent's employees.

(d) Refusing to bargain successor agreements with Section 9(a) bargaining representatives of Respondent's employees.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.[13]

5. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore all of the subcontracted operations previously performed by employees represented by Locals 659, 150, 853, 230, 245, 581, 314, 999, 696, 483, 747, and 707.[14]

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[13]The national scope of Respondent's conduct, the seriousness of that conduct, and the willingness of Respondent to engage in deception in order to avoid its responsibilities under the Act requires a broad cease-and-desist order. Hickmott Foods, 245 N.L.R.B. 1327 (1979).

[14]Respondent may introduce evidence, if there is any, at the compliance stage of this proceeding to demonstrate restoration of the subcontracted operations involved herein is unduly burdensome. See

(b) Reinstate all employees represented by said unions and terminated as a result of the subcontracting and make them whole for any loss of earnings they suffered by reason of that unlawful termination, said backpay to be computed in the manner described in the remedy section of this decision.

(c) Bargain with Local Unions 999, 935, 239, 581, 314, 999, 483, and 707, upon request, concerning the decision to subcontract and its effects on employees, and for successor collective-bargaining agreements.

(d) Furnish the requested information to Local 999 that I have found was unlawfully withheld by Respondent.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at all its offices in the continental United States, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days thereafter, in conspicuous places including all places where notices to

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Cowan-Nat, supra at fn. 3.

[14]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. December 30, 1994

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate employees in order to engage in recognition picketing.

WE WILL NOT unilaterally subcontract bargaining unit work.

WE WILL NOT refuse to bargain with Local Unions 684, 845, 230, 581, 314, 698, 483, or 709, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO concerning our decision and the effects thereof of subcontracting all work performed by employees represented by the unions.

WE WILL NOT refuse to bargain with Local Union 689, 685, 238, 581, 314, 688, 483, or 709 concerning successor collective-bargaining agreements.

WE WILL restore all of the subcontracted operations previously performed by employees represented by Local Unions 689, 150, 685, 238, 245, 581, 314, 688, 680, 483, 670, and 709.

WE WILL offer reinstatement to all employees who were terminated as a result of our unlawful subcontracting and make them whole for any loss of earnings they suffered by reason of that unlawful termination, with interest computed thereon.

WE WILL bargain with Local Unions 689, 685, 238, 581, 314, 688, 483, and 709, upon request, concerning the decision to subcontract and its effects on employees, and for successor collective-bargaining agreements.

WE WILL promptly furnish Local 689, if it so wishes, with information previously requested and relevant and reasonably necessary to its function as a collective-bargaining representative of our sprinkler fitter employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

AUTOMATIC SPRINKLER CORPORATION
OF AMERICA AND FICCIE
INTERNATIONAL INC.

APPENDIX E

The provisions of the National Labor Relations Act, as amended, which are involved herein are as follows:

SEC. 7. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . .

* * * *

SEC. 8. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer-

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . . .

* * * *

(5) to refuse to bargain collectively with the representatives of his employees . . . .

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification-

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within fifty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute

occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .